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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ....

LOEW'S INCORPORATED, RKO RADIO PICTURES, INC. and TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioners,

vs.

CINEMA AMUSEMENTS, INC.,
Respondent.

PETITION OF LOEW'S INCORPORATED AND TWENTIETH CENTURY-FOX FILM CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioners Loew's Incorporated and Twentieth Century-Fox Film Corporation pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on January 7, 1954.

Statement of the Case

On June 14, 1946, respondent instituted this action for treble damages under the Sherman and Clayton Acts.[1] In February, 1952, the jury returned a verdict for respondent and judgment was thereafter entered for treble damages in the amount of $300,000, plus attorney's fees and other taxable costs (R. 27-28). The judgment was affirmed by the United States Court of Appeals for the Tenth Circuit (R. 1222).

Respondent is the operator of the Broadway theatre located in the downtown business section of Denver, Colorado. Petitioners and RKO Radio Pictures, Inc. (hereinafter called "RKO"), which is filing a separate petition herein,[2] are three distributors of motion pictures.[3] The judgment is based upon respondent's claim that petitioners conspired with each other and with other distributors to deny respondent motion pictures for first-run exhibition at its Broadway theatre.

Each petitioner was interested, through stock ownership, in one or more first-run theatres in Denver during the period involved in this action. Loew's Incorporated (hereinafter called "Loew's") and RKO each had a 50 per cent. interest in Colorado Orpheum Corporation (hereinafter called "Colorado Orpheum"), owner and operator of the Orpheum theatre. Twentieth Century-Fox Film Corporation (hereinafter called "Twentieth Century-

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[1] 26 Stat. 209, 38 Stat. 730, 731, 737; 15 U. S. C. §§ 1, 12, 15 and 26.

[2] RKO, in its petition, adopts the Statement of the Case herein. The term "petitioners", when used herein, includes RKO.

[3] There are five other so-called major distributors of motion pictures. These other distributors were not named as defendants although they were claimed to be co-conspirators.

Fox"), through its indirect subsidiary Fox Inter-Mountain Theatres, Inc. (hereinafter called "Fox Inter-Mountain"), had an interest in the Denver and Paramount theatres (R. 144-145).

During the complaint period each petitioner licensed its pictures for first-run exhibition in Denver only to a theatre in which it had an interest (R. 882, 830, 931). Paramount, another distributor, licensed its pictures to the independent Denham theatre in which none of the parties here involved was interested (R. 97). The other principal distributors licensed pictures to the Denver and Paramount theatres (R. 95).

Respondent acquired the lease of the Broadway theatre in September, 1944, effective on November 1, 1944 (R. 1082-92), and, after some remodeling, reopened it on February 15, 1945 (R. 231). The Broadway is an old theatre which had been built in 1890 as a legitimate theatre (R. 208). It contains none of the appointments or advantages of more modern construction and is generally referred to as an "old opera house type" of theatre (R. 952). It has only 1,000 usable seats (R. 207). When respondent acquired the Broadway lease it knew that the theatre was being operated as a move-over run[4] theatre

[4]A move-over run is a continuation of the first run without any interval of time between runs. In other words, at the conclusion of the first run (i. e., the first exhibition of a picture in a particular locality) at one theatre, the picture opens the next day at the second theatre. To enable a theatre to be operated as a move-over theatre, the first-run theatre must waive the clearance which is customarily accorded it over subsequent runs. Clearance is the interval of time specified in license agreements which must elapse after a picture has completed its run in one theatre before it becomes available for exhibition in another theatre. When a first-run theatre waives its clearance to permit another theatre to operate on a move-over policy, it invariably has or receives a financial interest in the operation of the move-over theatre (R. 92, 831-834).

from the Orpheum theatre and that it had never been operated on a first-run policy (R. 941-42).

Commencing in September, 1944, almost two months before the effective date of its lease and continuing into November, 1945, respondent's operating head conducted direct negotiations with Loew's, RKO and Colorado Orpheum for the move-over run from the Orpheum theatre on the same terms on which that run had been licensed to Fox Inter-Mountain, the prior operator of the Broadway (R. 1105-19, 1129-1173). Thereafter, through respondent's attorney, the efforts to obtain the move-over run continued until about two months prior to the filing of the complaint (R. 1187-1188).

When respondent first requested the move-over run, the operator of the Orpheum theatre, for stated business reasons, declined to waive its first-run clearance, but, prior to the opening of respondent's theatre and after respondent had complained to the Department of Justice, agreed to such waiver (R. 1147-51). The move-over run was thereafter offered to respondent by Loew's and RKO on the same terms which had been in effect when Fox Inter-Mountain had operated the theatre (R. 820).

The evidence establishes that up until about one month before this action was instituted the only run of pictures requested by respondent in writing from any petitioner was this move-over run.

The move-over negotiations and correspondence are reflected in more than fifty letters and telegrams. In none is there a suggestion that respondent requested first run, or had any desire to operate on a first-run policy (R. 1105-1119, 1152-1174).

During these move-over negotiations respondent wrote to the Anti-Trust Division of the Department of Justice advising the Department that the only run which would satisfy it was the move-over run, the "same run the house had always enjoyed" (R. 1134-1136).

Also, the complaint alleged that respondent requested the move-over run on the same terms enjoyed by Fox Inter-Mountain and that such request was refused by Loew's and RKO (R. 5-7). The complaint does not allege that respondent requested and was denied pictures on first run (R. 1-11). Likewise, the action was brought against only three distributors, the only three who had an interest, directly or indirectly, in the move-over run on which the Broadway had operated before respondent acquired it.

Respondent refused the offer of the move-over run, claiming that the terms on which it was offered were less favorable than those which had previously been in effect. At the trial, however, respondent abandoned its claim that petitioners had conspired to deny it the move-over run. It stipulated that the terms upon which that run had been offered to it were the same terms in all respects as those in effect when Fox Inter-Mountain operated the Broadway (R. 820), and asserted a conspiracy to deprive it of *first-run* pictures. It offered testimony that, while the move-over negotiations were continuing, it made oral requests of petitioners for first-run pictures. There was no written evidence of any of these requests.

In May, 1946, a few weeks prior to filing the complaint, respondent for the first time sent a written request to each petitioner for a few specific pictures for first-run exhibition

(R. 436, 539-540, 546-547). Prior to that time respondent made a written request of a non-defendant distributor (R. 1094-1095).

Respondent offered testimony that certain non-defendant distributors, because of their relationships with Fox Inter-Mountain, did not license first-run pictures to respondent even though one distributor had a surplus of pictures (R. 518-519, 491-494, 523).

Respondent's witness also testified to the collateral matter that after respondent acquired the Broadway lease it negotiated with Fox Inter-Mountain for the equipment and fixtures but that its offer was rejected and Fox Inter-Mountain removed the equipment and fixtures (R. 674-75). Representatives of Fox Inter-Mountain testified that equipment was in short supply, that Fox Inter-Mountain proposed to use the equipment in other theatres and did so use it, and that the price offered by respondent was "grossly inadequate" (R. 955, 968).

There was no evidence that the activities of Fox Inter-Mountain were dominated, directed or controlled by Twentieth Century-Fox, or that any executive of Twentieth Century-Fox participated in any way in the operations of Fox Inter-Mountain. To the contrary, respondent stipulated that:

> "The defendant, Twentieth Century-Fox Film Corporation, is engaged solely in the business of production and distribution of motion pictures. Its only interest in the exhibition business in the Denver area is by reason of its stock ownership of Fox Intermountain Theatres. Fox Intermountain Theatres is a corporate entity wholly separate and distinct from Twentieth Century-Fox Film Corpo-

ration. The two companies having no interlocking officers or directors." (R. 145-146)

There was no evidence (1) that any petitioner knew or had reason to know of any requests for first-run pictures allegedly made by respondent to any other petitioner or distributor, (2) that any petitioner had any contact with any other petitioner or with any non-defendant distributor or with Fox Inter-Mountain concerning the licensing of first-run pictures to respondent, (3) that any petitioner had any correspondence or discussions with any non-defendant distributor regarding the licensing of pictures to respondent on any run, or (4) that any petitioner knew of the negotiations between respondent and Fox Inter-Mountain with respect to the Broadway's equipment and fixtures.

In its review of the record the court below, while adverting extensively to respondent's testimony concerning dealings with non-defendants, pointed to no fact or circumstance connecting any petitioner with the activities of Fox Inter-Mountain or with any transactions involving any non-defendant distributor.

Each petitioner presented testimony that it acted independently, without discussion with any other distributor, and in its best business interests in licensing its pictures on first run in Denver (R. 835-36, 882-884, 931-934). The theatres in which petitioners had interests were the newest, largest and best houses in Denver (R. 829, 933, 952-53). Each had a seating capacity more than double the capacity of the Broadway (R. 207). Each petitioner received from its own theatre not only substantial film rentals but also an interest in the profits derived from the operation of the theatre (R. 970, 830, 882, 931-932).

While negotiations for the move-over run were in progress, each petitioner licensed pictures to respondent on runs and under circumstances which enabled respondent to earn a profit of $42,000 in the short period of sixteen months, which was the entire period here involved (R. 978). After the complaint period, and commencing in the latter part of 1948, respondent operated the Broadway on a first-run policy and, according to its counsel, it then "lost money" (R. 114).

Each petitioner was a party to a Consent Decree entered in 1940 by the United States District Court for the Southern District of New York, in a proceeding entitled *United States* v. *Paramount Pictures, Inc., et al.*[5] This decree was in effect throughout the entire period involved in this action. Section XVII of the decree provided that each petitioner had the right to license its pictures to any theatre in which it had a financial interest on such terms and subject to such conditions as might be satisfactory to it. This Section of the Consent Decree was received in evidence without objection (R. 1105). Thereafter the trial court, on its own motion, ordered it stricken and instructed the jury to "disregard it entirely" and to "erase it from your minds" (R. 755).

The trial court refused to permit petitioners' witnesses to testify that, in licensing pictures to theatres in which they had an interest, they took into consideration the provisions of said Section XVII (R. 816-819). The court also refused to charge that each petitioner had the right to license

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[5]This case is referred to hereafter as "the *Paramount* case." Certain proceedings subsequent to the Consent Decree, which were determined after the institution of this action, are reported in 66 F. Supp. 323, 70 F. Supp. 53, 334 U. S. 131, and 85 F. Supp. 881.

its own pictures to its own theatres upon such terms and conditions as might be satisfactory to it and that no inference of conspiracy could be drawn from the fact that it did so (R. 59, 46-47, 61, 68-69).

The trial court, over objection, admitted, as *prima facie* evidence of conspiracy against Loew's and Twentieth Century-Fox, but not against RKO, certain provisions of a final decree entered in the *Paramount* case on February 8, 1950 (R. 788-789).

The trial court denied petitioners' motions for a directed verdict and judgment notwithstanding the verdict and, in the alternative, to set aside the verdict and for a new trial. In making said motions, petitioners urged, among other things, that as a matter of law the essential elements of conspiracy had not been established, even if all of respondent's testimony were accepted as true.

Opinions Below

The District Court rendered no opinion. The opinion of the Court of Appeals appears at pages 1209-1222 of the record and is officially reported in 210 F. (2d) 86.

Jurisdiction

The judgment of the Court of Appeals was entered on January 7, 1954 (R. 1222). Timely petitions for rehearing were filed on February 8, 1954, and were denied on February 26, 1954 (R. 1287).

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. § 1254 (1).

Questions Presented

I. Whether the court below erroneously sanctioned the action of the trial court in admitting the decree in the *Paramount* case against Loew's and Twentieth Century-Fox as *prima facie* evidence of conspiracy, which ruling misinterpreted and ran counter to the principles established by this Court in *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951), and is contrary to the rationale of the decision of this Court in *Theatre Enterprises* v. *Paramount*, 346 U. S. 537 (1954).

II. Whether the court below erroneously sanctioned the ruling of the trial court (a) in striking from the evidence on its own motion certain provisions of the 1940 Consent Decree (*supra*, pp. 8-9) which were admitted without objection and which expressly recognized the right of each petitioner to license pictures distributed by it to theatres in which it had a financial interest, and (b) in refusing to permit petitioners' witnesses to testify as to their reliance upon such provisions in the licensing of their pictures.

III. Whether the court below erroneously sanctioned the denial by the trial court of petitioners' motion for a directed verdict, which ruling is contrary to decisions of this Court and various Courts of Appeals as to the quantum of proof necessary to support a finding of conspiracy.

If the petition be granted, petitioners intend to argue also the following questions presented by the record:

IV. That the court below erroneously sanctioned the charge of the trial court relating to the effect of the decree in the *Paramount* case as *prima facie* evidence.

V. That the decision of the court below, which impliedly holds that testimony of oral requests for first run in direct conflict with contemporaneous written requests for a different run constitutes an adequate assertion of a claim for first-run pictures, is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. (2d) 561, 565-67, cert. den. 342 U. S. 909.

Reasons for Allowance of the Writ

I.

Portions of the decree entered in the *Paramount* case on February 8, 1950, against Loew's and Twentieth Century-Fox were offered and received in evidence in this case under Section 5 of the Clayton Act, over objection, as *prima facie* evidence of conspiracy against those petitioners.

Section 5 authorizes a plaintiff in a treble damage action to use a government decree adjudicating that a defendant has violated the anti-trust laws as *prima facie* evidence against the same defendant "as to all matters respecting which said . . . decree would be an estoppel as between the parties thereto". As this Court pointed out in *Emich Motors* v. *General Motors, supra:*

> "The evidentiary use which may be made under § 5 of the prior [judgment] is thus to be determined by reference to the general doctrine of estoppel." (p. 568)

There are two conditions which must be satisfied before the doctrine of estoppel may be invoked: (1) the matter

must have been "distinctly put in issue and directly determined" in the prior suit;[6] and (2) the matter must be determinative of an "ultimate" fact in the second suit.[7]

(a) "Distinctly put in issue and directly determined"

Nothing was "distinctly put in issue and directly determined" in the *Paramount* case with respect to the central and controlling issue in the instant case,—namely, whether these petitioners participated in a conspiracy in Denver to prevent the respondent from securing pictures to exhibit on first run in its Broadway theatre. This is clear from the decision of the Expediting Court in the *Paramount* case itself.

The *Paramount* case adjudicated, on the basis of the wholly documentary and statistical evidence on which the government relied, that the defendants had violated the anti-trust laws on a national basis. Except for certain references to New York City, the Expediting Court did not make any findings concerning the conduct of the defendants in any particular city. Indeed, the court expressly disclaimed making any such finding, stating that it could not "find sufficient evidence to support an inference that the major defendants . . . have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances [and runs]. . . ." (66 F. Supp. 323 at 342, 345)

The Court of Appeals for the Second Circuit in *Dipson Theatres* v. *Buffalo Theatres*, 190 F. (2d) 951, cert. den.

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[6] *Emich Motors* v. *General Motors*, *supra*, p. 569.

[7] *United Shoe Mach. Co.* v. *United States*, 258 U. S. 451, 459 (1922); *The Evergreens* v. *Nunan*, 141 F. (2d) 927, 929 (2nd Cir. 1944).

326 U. S. 926, expressly recognized the limitations of the decision in the *Paramount* case. In the opinion written by Judge Augustus N. Hand, who also wrote the opinion of the Expediting Court in the *Paramount* case, the court said:

> "Also the expediting court in the Paramount case specifically held, contrary to Dipson's position, that 'The decision of such controversies as may arise over clearances should be left to local suits in the area concerned'. U. S. v. Paramount Pictures, D. C., 66 F. Supp. 323-342. * * * There is also no showing that evidence of the Buffalo situation was introduced or relied upon by the government in proving the conspiracy in the Paramount case. Therefore we must look to the record in this case to see if Dipson has shown that the general conspiracy found to exist in the Paramount case, or some other conspiracy, had as one of its objects or effects the monopolization of the first and second run exhibition of pictures in the Buffalo area and that he suffered injury as a result." (p. 958)

This Court recently had occasion to consider the effect of the decrees in the *Paramount* case in private anti-trust litigation. In *Theatre Enterprises* v. *Paramount*, 346 U. S. 537, this Court affirmed the decision of the Court of Appeals for the Fourth Circuit which had affirmed a judgment for the defendants. The trial court in that case had admitted in evidence portions of decrees in the *Paramount* case. One of the plaintiff-petitioner's fundamental contentions in this Court was that the instructions of the trial court with respect to the *prima facie* effect of those decrees actually had deprived petitioner of the benefits to which it was entitled under Section 5 of the Clayton Act. The charge in controversy contained the following:

> "There was not before the Court in the prior [Paramount] case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable." (346 U. S. 537, 543)

This Court rejected the petitioner's argument in the *Theatre Enterprises* case and held that nothing was distinctly put in issue or directly determined in the *Paramount* case as to the existence of a conspiracy in a particular city, saying:

> "The *Paramount* decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the nub of plaintiff's claim." (346 U. S. 537, 543)

This case differs from the *Theatre Enterprises* case in that here the respondent's theatre was operated during a part of the time (the year 1945) to which the findings in the *Paramount* case relate. Furthermore, the decrees having been admitted in evidence in the *Theatre Enterprises* case and the respondents having prevailed in that litigation, this Court had no occasion to decide whether, as contended by the respondents, the decrees were inadmissible, saying:

> "We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the

earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it." (346 U. S. 537, 544)

The question left open in the *Theatre Enterprises* case is squarely presented here. We submit that the rationale of that case, as expressed in this Court's opinion, and proper application of the authorities cited above establish that in a case such as this the admission of the *Paramount* decree as *prima facie* evidence constitutes reversible error.

The essence of respondent's claim here was the existence of a conspiracy in Denver, just as the existence of a conspiracy in Baltimore was the "nub" of plaintiff's claim in the *Theatre Enterprises* case. No such issue was either litigated or "determined" in the *Paramount* case.

(b) Determinative of an "ultimate" fact

As this Court has held, in order for a decree in a government case to operate as an estoppel, the matter there litigated must be determinative of an *ultimate* fact in the second suit. *United Shoe Mach. Co.* v. *United States*, 258 U. S. 451, 459 (1922); *United States* v. *Moser*, 266 U. S. 236, 241 (1924). To the same effect is *The Evergreens* v. *Nunan*, 141 F. (2d) 927 (2nd Cir. 1944). The general doctrine of estoppel does not permit the use of a fact established in a prior litigation as proof of a *mediate* or *collateral* fact in the second litigation from which an *ultimate* fact in that litigation can be deduced. It only permits the use of a fact necessarily determined in the first action to establish an identical *ultimate* fact in the second. As was said in *United Shoe Mach. Co.* v. *United States*, *supra*, an essential

test is whether there was "some matter litigated in the former suit determinative of the matter in controversy in the second suit." (p. 459) To the same effect is *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, (1897), where estoppel was said to exist only "when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties. . . ." (p. 396)

It is self-evident that the adjudication of the existence of the conspiracy found in the *Paramount* case could in no sense be deemed *determinative* of the ultimate issue here, that is, the existence of a local conspiracy involving alleged local restraints in Denver. It is clear that if the Government, instead of respondent, had instituted the instant action, the decision in the *Paramount* case could not have operated as an estoppel in its favor. These petitioners would still have been entitled to contest the issue of the existence of a local conspiracy to deprive respondent of first-run pictures.

In other words, the adjudication of anti-trust violations on a national scale does not establish the existence of a conspiracy in a particular city. As the court said in *Dipson Theatres* v. *Buffalo Theatres, supra*:

> "However, we have already had occasion to pass on the question of whether the Paramount case, supra, is conclusive of the question of conspiracy among the distributor defendants in a private treble damage action involving a single city. We answered in the negative [referring to *Fifth and Walnut* v. *Loew's Incorporated*, 176 F. (2d) 587]." (p. 957)

At most, an adjudication in the government case of conspiracy on a national scale would be no more than a

mediate fact in this case. As such, under the general law of estoppel and Section 5, plaintiff was not entitled to prove that mediate fact *prima facie* by the introduction of the *Paramount* decree.

The misconception of the court below of the foregoing principles is apparent from its opinion. The court below properly said that the *Paramount* decree "was not conclusive evidence of the alleged conspiracy on which the plaintiff's case was predicated". It then held, however, that the decree was "admissible along with other evidence in making out a prima facie case against Loew's and Fox." (R. 1212) Thus, the court below, while expressly finding that the *Paramount* decree was not determinative of the issue in this case, nevertheless held that respondent could use it as *prima facie* evidence from which, presumably, the ultimate issue of a conspiracy in Denver could be established. The court below apparently believed that the *mediate* fact of a national conspiracy could be established *prima facie* by the decree and could then be connected with other facts to establish respondent's case. This was error. Only if the determinative issue, namely, the existence of a conspiracy in Denver to injure respondent had been adjudicated in the *Paramount* case (which it was not) could the decree entered in that case have been admissible as *prima facie* evidence.

Under the controlling principles of admissibility, as established by *Emich, Theatre Enterprises* and other decisions of this Court, no proper basis existed for admitting the *Paramount* decree in this action. And the error which was committed was highly prejudicial. This was a jury case. The admission of a decree in a government case and its description as a prior judicial determination that the

defendants were, in effect, "convicted" of violations of the anti-trust laws, together with argument of counsel that the defendants were found "guilty" in that case and should be in the instant case, has an impact upon a jury, the prejudicial effect of which cannot be over-emphasized.

Furthermore, we respectfully urge that it is in the public interest for this Court to grant this petition and decide the issue here presented. There is a literal welter of private anti-trust cases involving the motion picture industry now pending in and clogging the calendars of the federal courts in every section of the country. The number of such pending cases is in excess of two hundred, and the total amount of damages sought is hundreds of millions of dollars. In substantially all of those cases the complaints indicate that plaintiffs intend to rely upon the *Paramount* decree to convince a jury that a conspiracy has been established. An adjudication by this Court with respect to the inadmissibility of the *Paramount* decree would bring to an end much of this litigation which is bottomed upon this untenable premise. In any event, the trial courts should have the guidance of this Court on the question of admissibility in similar situations involving this industry.

II.

In 1940 the petitioners and certain other distributors of motion pictures and the United States Government became parties to a Consent Decree entered in the United States District Court for the Southern District of New York. That decree was in full force and effect during the entire period covered by the complaint in this action. It placed certain limitations upon the petitioners' conduct with respect to certain trade practices in the industry. Section

XVII of that decree expressly recognized, however, the right of each petitioner to license, without limitation, motion pictures distributed by it to any theatre in which it had a financial interest.[8] As said in *Dipson Theatres* v. *Buffalo Theatres, supra,* this Consent Decree

> "* * * specifically preserved [a defendant's] right to favor its own theatres." (p. 960)

Each petitioner had such a financial interest in the particular theatre in Denver to which it licensed its pictures on first run during all of the time involved in this lawsuit.

Petitioners duly offered this portion of the Consent Decree in evidence; respondent offered no objection to its admission; and it was received as Defts.' Exh. 4 (R. 309) in evidence. Thereafter, the trial court, on its own motion, struck this exhibit and instructed the jury as follows:

> "The Court . . . has concluded that that portion of the [consent] decree was improperly admitted in evidence and so, on the Court's own motion, the portion of the decree which was read is stricken from the record and I instruct you now to disregard it entirely and not to draw any inferences or conclusions of any sort therefrom. As much as possible I wish you would erase it from your minds." (R. 755)

This portion of the Consent Decree was properly admissible in evidence. The existence of the Consent Decree

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[8]Section XVII of that decree provided in part as follows:

> "Nothing contained in this decree shall be construed to limit, impair or restrict in any way whatsoever the right of each distributor defendant to license the exhibition . . . upon such terms and subject to such conditions as may be satisfactory to it, of any or of all of the motion pictures which it may at any time distribute (1) in any theatre in the ownership, lease, management or operation . . . of which it directly or indirectly . . . owns a financial interest. . . ."

and its provisions were facts—and facts of great importance in the distribution of motion pictures. Each distributor which was a party to that Consent Decree plainly was entitled to rely upon the provisions in question in refusing demands from any other exhibitor seeking to secure pictures for exhibition on the run licensed to the theatre in which the distributor had an interest. Petitioners were entitled to bring to the attention of the jury the fact that, in this respect, they were acting under, and their actions were in accordance with, those provisions. That would have eliminated from the case any question of arbitrary or unreasonable conduct by the petitioners.

The error of the trial court was compounded when the court instructed the jurors to "erase" the provisions of the decree from their minds. Such an instruction unquestionably conveyed to the jury the impression that doubt existed as to the right of each petitioner to license its pictures to a theatre in which it had an interest.

Equally important was the prejudice suffered by petitioners in the presentation of their case. At a conference in chambers, counsel for petitioners informed the court that a witness would be asked to testify concerning the policy of a petitioner in licensing its pictures for exhibition in a theatre in which it had a financial interest; that the witness would be asked if he was familiar with the provisions of the 1940 Consent Decree and also asked if, in licensing pictures, petitioner took into consideration the provisions of Section XVII of that decree. It was made clear that the witness would not be asked for a legal conclusion. The court ruled that any such question would be improper and would not be permitted (R. 816-818).

Thus, petitioners were precluded from showing that any refusal of any demands made by respondent stemmed not

from conspiracy but from the exercise of what they understood to be a clearly defined legal right. They were foreclosed from showing their motive, purpose and business reasons in not acceding to respondent's alleged demands for first run, factors which, in a conspiracy case, are of first importance.

The treatment by the trial court of the entire matter of the right of each petitioner to license its pictures to theatres in which it had an interest was extremely prejudicial to the petitioners and a drastic departure from the proper treatment of the subject as passed upon in the *Theatre Enterprises* case. In that case the trial court expressly adverted to the affirmative right of certain defendants which had theatres in Baltimore to license their own pictures to those theatres, and charged the jury:

> "During all of the time here in controversy Loew's had a right, as a distributor, to prefer its own theatres, as I have explained, as customers in licensing its own pictures." (R. 1241)

and again:

> ". . . Loew's . . . relies upon the right,—which I instruct you is its legal right—to show its own pictures in its own theatres exclusively, as and when it sees fit." (R. 1240)

This Court found no error in such charges and impliedly affirmed the right of a distributor to prefer its own theatres, stating:

> "Respondents Loew's and Warner refused petitioner an exclusive license because they owned the three downtown theatres receiving their first-run product." (346 U. S. 537, 540)

Far different was the charge of the trial court in this case. Nothing was said with respect to the affirmative right of each petitioner to license its pictures to its own theatres, as the court was requested to charge by petitioners (R. 59, 46-47, 61, 68-69). To the contrary, in the only pertinent portion of its charge the court couched its language in such fashion that it conveyed to the jury doubt of the existence of such right. Indeed, from the court's charge the jury could have inferred conspiratorial conduct from petitioners' exercise of their clear legal right. The trial court charged:

> "The fact that you may find that each of the defendants licensed its feature pictures to theatres in which it had an interest is not in and of itself and standing alone sufficient to warrant the inference of a conspiracy unless you conclude from the evidence that their conduct was the result of concerted action or common design to injure plaintiff." (R. 23)

We respectfully submit that the affirmance by the court below of the trial court's rulings with respect to the Consent Decree, and the trial court's charge with respect to the licensing by the petitioners of their own pictures to their own theatres, constitute reversible error.

III.

Assuming that all the testimony offered by respondent was true, and considering the evidence in the light most favorable to respondent, the evidence was insufficient as a matter of law to support an inference that petitioners were parties to a conspiracy which prevented respondent from securing first-run pictures for its Broadway theatre. At the trial, this was the only issue tendered by respondent.

It abandoned its claim that it had been damaged by reason of any refusal to license the move-over run, and conceded that it had in fact been offered that run on the same terms which had been in effect when Fox Inter-Mountain operated the theatre (R. 820).

There was, of course, no direct evidence of conspiracy. Taking its evidence at face value, respondent's claim of conspiracy came down to this. In conversations with local employees of the three petitioners and five other distributors respondent requested first-run pictures for the Broadway theatre at the same time that it was, in writing, demanding the move-over run. First-run pictures were not licensed to respondent. Respondent was told by employees of each petitioner that it licensed its feature pictures on first run to a theatre in which it had a financial interest. Employees of the non-defendant distributors told respondent that each would continue to license its existing first-run customer. Reduced to its essentials, that was the evidence from which respondent claimed that a conspiracy could be inferred.

The record establishes the following fatal deficiencies in respondent's case:

(a) There was no uniform refusal by petitioners to deal with respondent. Loew's and RKO offered respondent the move-over run, which respondent in writing had insisted was the only run which would be satisfactory to it.*

Having acceded to respondent's requests in this respect, no basis exists for an inference that petitioners, acting conspiratorily, refused to deal with respondent for first-run pictures. The two runs are mutually exclusive. Respondent

*Respondent concededly made no written demand upon Twentieth Century-Fox for first run, move-over run or any other run until two weeks prior to the institution of this action.

could not operate its theatre on a move-over policy and a first-run policy at the same time. Having offered precisely what respondent had repeatedly sought in writing through its operating head, its attorneys and the Department of Justice, Loew's and RKO were entitled to believe that they had satisfied respondent's demands and had eliminated any basis for a law suit.

(b) There is no evidence, or even suggestion, either in the written record or the oral testimony, that any petitioner knew or had reason to know of any oral requests for first run made to any other petitioner or any other distributor or of the decisions made with respect to those requests. Unlike the plaintiff in *Ball* v. *Paramount Pictures*, 169 F. (2d) 317 (3rd Cir. 1948), respondent here did not bring to the attention of petitioners knowledge of its requests to others and of the decisions made with respect to those requests. There were no letters, as in *Interstate Circuit* v. *U. S.*, 306 U. S. 208 (1939), addressed to all the defendants jointly, which showed that all knew of a proposed plan and the joint action contemplated by such plan.

The court below referred to some of the evidence which it held warranted an inference of the existence of a conspiracy involving petitioners and other co-conspirators (210 F. (2d) 94-95). All this evidence relates entirely either to actions of Fox Inter-Mountain or to dealings between Fox Inter-Mountain and non-defendant distributors or to dealings between such non-defendant distributors and respondent. None of it is connected with any of the petitioners.[10]

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[10] As to the relationship between Fox Inter-Mountain and petitioner Twentieth Century-Fox, the court below simply said that the

The holding in this case is, in effect, that mere similarity, without more, is sufficient to permit an inference of conspiracy. It is support for a new theory of conspiracy—"unconscious parallelism of action"—a theory which has no support in any other decided case, and a theory which we believe this Court should repudiate. *Cf. Krulewitch* v. *United States*, 336 U. S. 440 (1949), concurring opinion of Mr. Justice Jackson in which Mr. Justice Frankfurter and Mr. Justice Murphy joined.

(c) In the absence of a showing that petitioners acted contrary to their best business interests, no inference of conspiracy can arise. In *Dipson Theatres* v. *Buffalo Theatres, supra*, the court said:

> "At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed." (p. 958)

The findings of conspiracy in such cases as *Milgram* v. *Loew's, Inc.*, 192 F. (2d) 579 (3rd Cir. 1951) and *Ball* v. *Paramount Pictures*, 169 F. (2d) 317 (3rd Cir. 1948), were bottomed upon express findings of conspiracy by the District Court and also upon the fact that the plaintiff in each case demonstrated that the defendants would have fared better if they had licensed the plaintiff rather than the theatre or theatres customarily licensed. Such action, contrary to the defendants' best business interests, was held

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former was a subsidiary of the latter. There is no evidence linking Twentieth Century-Fox with any activities of Fox Inter-Mountain and respondent had stipulated that the two companies were separate and distinct entities engaged in different branches of the industry and had no inter-locking officers or directors (*supra*, pp. 6-7).

to have been evidence of and the necessary result of conspiratorial action.

On the record here it is clear that petitioners acted in their best business interests in licensing pictures on first run in Denver. The theatres in which petitioners had an interest were the newest, largest and best houses. Each had a seating capacity more than twice that of the Broadway. For years those theatres had been operated as first-run theatres. The Broadway, on the other hand, was an old house built in 1890 which had never been operated as a first-run theatre. The established first-run houses had been satisfactory outlets in every way for petitioners' pictures. Their management was able and experienced (R. 829, 932). The management of the Broadway was new and untried in Denver (*supra*, pp. 3, 7-8).[11]

In addition to all the above, each petitioner had a financial interest in the particular theatre to which it licensed its pictures. Each thereby received from its established outlet not only substantial film rentals but a share in the profits derived from the operation of the theatre (*supra*, pp. 7-8).

From the foregoing it appears that the elements necessary to support an inference of conspiracy are wholly lacking. The court below, in affirming the denial of petitioners' motion for a directed verdict, did violence to the accepted legal standards as to the quantum of proof necessary to establish a conspiracy and committed reversible error.

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[11]Respondent offered testimony in general terms as to the advantages of certain policies of exhibition. In the complaint period, however, there is no evidence that respondent ever offered any film rental or other terms which could lead any petitioner to believe that it would be to its advantage to license the Broadway rather than the theatre in which it had a financial interest.

CONCLUSION

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all the proceedings herein, and to the end that the judgment of the said Court of Appeals may be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

LOEW'S INCORPORATED,
TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioners.

By FREDERICK W. R. PRIDE,
C. STANLEY THOMPSON,
ALBERT J. GOULD,
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Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

LOEW'S INCORPORATED, RKO RADIO PICTURES, INC. and TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioners,
vs.
CINEMA AMUSEMENTS, INC.,
Respondent.
No.

PETITION OF RKO RADIO PICTURES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioner, RKO Radio Pictures, Inc. (hereinafter called "RKO"), respectfully prays that a writ of certiorari be issued to review the judgment in the Court of Appeals for the Tenth Circuit entered in the above-entitled case on January 7, 1954. RKO is one of three petitioners; the other two, Loew's Incorporated (hereinafter called "Loew's") and Twentieth Century-Fox Film Corporation (hereinafter called "Twentieth Century-Fox") have filed a joint petition for a writ of certiorari.

This is an action for treble damages under the Sherman and Clayton Acts.[1] The trial court, over objection, admitted

[1] 26 Stat. 209, 38 Stat. 730, 731, 737; 15 U. S. C. §§ 1, 12, 15, and 26.

in evidence against Loew's and Twentieth Century-Fox under Section 5 of the Clayton Act, 38 Stat. 731, 15 U. S. C. Section 16, certain portions of a final decree entered in the case of *United States* v. *Paramount Pictures, Inc., et al.*[1] (R. 788-789). No portion of the *Paramount* decree was admitted against RKO. Accordingly, RKO is in a different position from the other petitioners.

Portions of the joint petition of Loew's and Twentieth Century-Fox apply to RKO and others do not. RKO hereby adopts the joint petition of Loew's and Twentieth Century-Fox in the respects indicated below.

STATEMENT OF THE CASE

RKO adopts the statement of the case made in the joint petition of Loew's and Twentieth Century-Fox.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals appears at pages 1209-1222 of Volume II of the Record and is reported at 210 F. (2d) 86.

JURISDICTION

RKO adopts the statement of jurisdiction made in the joint petition of Loew's and Twentieth Century-Fox.

QUESTIONS PRESENTED

RKO adopts questions numbered II, III and V presented in the joint petition of Loew's and Twentieth Century-Fox.

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[1] 66 F. Supp. 323, 70 F. Supp. 53, 334 U. S. 131, and 85 F. Supp. 881.

Questions I and IV which appear therein relate to the admissibility of the *Paramount* decree against Loew's and Twentieth Century-Fox and to the trial court's charge with respect to the effect of that decree. Since that decree was not admitted against RKO those questions are not presented by RKO. In addition, RKO presents the following question:

I. Whether the court below erroneously sanctioned the trial court's ruling denying RKO's motion for a directed verdict, since the decree in the *Paramount* case was not admitted against RKO as *prima facie* evidence, and, absent such evidence, the ruling is contrary to the decisions of this Court and various Courts of Appeals as to the elements of proof necessary to support a finding of conspiracy.

REASONS FOR ALLOWANCE OF THE WRIT

In addition to the reasons advanced in the joint petition of Loew's and Twentieth Century-Fox for granting a writ of certiorari, RKO submits the following:

The decree in the *Paramount* case which might have constituted prima facie proof of a conspiracy to deprive respondent of first run pictures was not admitted against RKO. As far as RKO is concerned respondent cannot use the *Paramount* decree to cure any deficiencies in its proof.

Assuming the full truth of all of the evidence adduced on behalf of respondent, it proves that RKO refused oral requests by respondent to license pictures on first-run to it rather than to the Orpheum Theatre and that, pursuant to numerous written requests therefor by respondent (R. 1129-1130, 1132, 1139, 1165-1171), RKO offered to license its

pictures to respondent on a move-over run from the Orpheum Theatre on the same terms that had prevailed when Fox-Intermountain Theatres, Inc. (hereinafter called "Fox Inter-Mountain") operated the Broadway Theatre on a move-over run. In short, RKO, faced with conflicting requests by respondent for two different runs, which, though closely related, are mutually exclusive, offered respondent the run which respondent advised RKO and the Department of Justice in writing was the only run which would satisfy it (R. 1134-1136, 1139-1140).

The trial court by permitting the case to go to the jury as against RKO allowed the jury to infer participation in a conspiracy from a course of conduct made necessary by respondents' conflicting requests.

The Court of Appeals in its opinion referred to some of the items of evidence which it apparently believed warranted the jury in drawing an inference of conspiracy among petitioners and other alleged co-conspirators, 210 F. (2d) 86, at pp. 94-95. This evidence, such as the refusal of Fox Inter-Mountain to sell its fixtures to respondent and its removal thereof from the theatre, the refusal to license films which were not exhibited in any other theatre in Denver, the existence of a surplusage of films available for exhibition in Denver,[3] the rejection on a higher level of recommendations that films desired by respondent be licensed

[3]Respondent showed that during the period from February 15, 1945, to June 14, 1946, a period of 69 weeks, RKO licensed 49 pictures to the Orpheum Theatre and that 32 of these pictures played for one week, 16 for two weeks and one for three weeks (R. 651-652). Respondent claimed these figures demonstrated that RKO and the Orpheum Theatre enjoyed a glut of product in that many of the pictures were exhibited for only one week. In the absence of evidence, of which there was none, as to the character of these pictures or as to whether they merited even a one week run no inference of glut of product is permissible.

to respondent, the inquiry as to whether respondent would be interested in selling its lease to Fox Inter-Mountain, and the suggestion by a non-defendant distributor that respondent join the Fox Inter-Mountain circuit, related entirely and exclusively either to the actions of Fox Inter-Mountain or to dealings between Fox Inter-Mountain and non-defendant distributors or to dealings between such distributors and respondent. None of this evidence had any relation to anything said or done by RKO, nor was it connected with RKO through the medium of the *Paramount* decree or by circumstantial evidence or in any other way.

RKO as a matter of policy licensed its pictures on first run to the Orpheum Theatre, conceded by respondent to be the finest in Denver, because of its financial interest in that theatre and it did not license its films on first run to the Fox Inter-Mountain theatres or to any other theatres in Denver (R. 245, 830).[4]

As against RKO's co-defendants there was evidence which did not involve RKO. Fox Inter-Mountain was an affiliate of petitioner Twentieth Century-Fox, but evidence, such as that mentioned in the Court's opinion concerning the actions of Fox Inter-Mountain, was in no way connected with RKO. Further, as mentioned above, portions of the *Paramount* decree were admitted against Loew's and Twentieth Century-Fox, but not against RKO.

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[4]There is evidence that two pictures released by RKO, one of which was produced by Walt Disney and the other by Samuel Goldwyn were licensed to Fox Inter-Mountain after the complaint was filed (R. 1204, 562-564). The distribution contracts which RKO had with each of these producers provided that the producer had the right to approve or reject contracts negotiated by RKO and the producers did, in fact, exercise that right (R. 844-846). Accordingly, RKO could not control where the pictures were to be shown. Even if it could or did such action can form no basis for a recovery here as the licensing of both pictures took place after the date of the complaint.

As to RKO, the most that the evidence shows is that RKO faced with conflicting demands, offered respondent the run it demanded in writing.

To allow the judgment below to stand would be to permit an inference of unlawful conspiracy to be drawn from a defendant's rejection of a plaintiff's oral demands when such rejection necessarily follows from the defendant's acquiescence with the same plaintiff's written demands. If the law permitted such a result, every business man would be placed on the horns of an impossible dilemma. If of two mutually exclusive demands of the same party, he granted one—he can grant only one—he would do so at the risk of being sued for not granting the other, whichever it might be, if one or more others happened to act the same way.

If, for example, RKO and Loew's had both refused to license respondent on the move-over run but, together with Twentieth Century-Fox, they had licensed it first-run pictures, respondent could still have brought an action against petitioners claiming that it would have made more money on a move-over run and that it was prevented from doing so by the same three defendants. Respondent could make an even more persuasive argument for denial of the move-over run than it could for denial of first run. It could claim that the Broadway historically had been granted the move-over run, that its size, age and appointments made it suitable for a move-over run theatre, not a first-run house, that it consistently and persistently demanded of RKO and Loew's that it be licensed on a move-over run on the same terms they had licensed Fox-Intermountain, that it would be unable to pay the higher film rentals demanded by distributors for first-run exhibition,

that Loew's and RKO denied its request for the move-over run and licensed it only on first-run because they knew that the Broadway could not operate as a first-run house and that, in so doing, they conspired with Twentieth Century-Fox to put respondent out of business. The fact is that the Broadway made large profits during the complaint period while operating on a subsequent run policy whereas after the complaint period it lost money when it operated on a first-run policy and was required to pay the higher film rentals demanded for first run exhibition (R. 775, 978, 114). Thus, no matter which of respondent's requests it granted, RKO was exposed to a charge of conspiracy.

In every case where a conspiracy has been found to deny pictures to an exhibitor it was clear that the plaintiff requested one specific run of pictures only—not two mutually exclusive runs—and was denied the requested run as a result of concerted action. *e.g. Milgram* v. *Loew's, Inc.*, 192 F. (2d) 579 (3rd Cir. 1951), *Ball* v. *Paramount Pictures*, 169 F. (2d) 317 (3rd Cir. 1948). This is true not only of motion picture cases. We know of no anti-trust case where the proof showed that a plaintiff sought entrance into two mutually exclusive markets and a conspiracy was found to exist among defendants who offered the products or facilities requested by the plaintiff to enable him to enter into one of the requested markets.

There is, so far as we have been able to discover, only one case which presents a situation similar to that in this case. In *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. (2d) 561 (7th Cir. 1951), *cert. den.* 342 U. S. 909, the plaintiff, upon acquisition of a theatre that had been operated on a second run, notified the distributors in writing, as did respondent here, that he intended to continue to

operate the theatre on its existing run. Later he made substantial alterations in the theatre, at the conclusion of which he sought first run, which was denied, and he brought suit. At the trial, he testified that at the same time he wrote the distributors stating his intent to operate on a second-run policy he made oral requests for first-run pictures. The Court of Appeals rejected the oral testimony as incredible as a matter of law and reversed that part of the judgment based upon a finding that plaintiff, prior to the renovation of the theatre, had made oral requests for first run (190 F. (2d) 561, 565-67).

Any other conclusion would do violence to ordinary common sense and to fundamental concepts of justice and fair dealing. Where a party has deliberately placed those with whom he deals in a position where, by granting one of his demands they necessarily are unable to grant another or others, he should not be permitted to capitalize on his inconsistent conduct and a jury should not be permitted to speculate that the granting of the one demand constituted a conspiracy to deny the other.

We respectfully submit that this case should never have been submitted to a jury for such speculation. Here respondent so acted that, no matter what RKO did, respondent could claim that RKO acted as a conspirator to damage it. Under the decisions of this Court, in order to establish a prima facie case, more must be shown than the making of two mutually exclusive demands, one of which was granted.

Conclusion

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all the proceedings herein, and to the end that the judgment of the said Court of Appeals may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem just; and your petitioner will ever pray.

RKO RADIO PICTURES, INC.
Petitioner

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FILED
MAY 12 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 693 and No. 694

LOEW'S INCORPORATED, RKO RADIO PICTURES, INC. and TWENTIETH CENTURY-FOX FILM CORPORATION, *Petitioners*,

v.

CINEMA AMUSEMENTS, INC.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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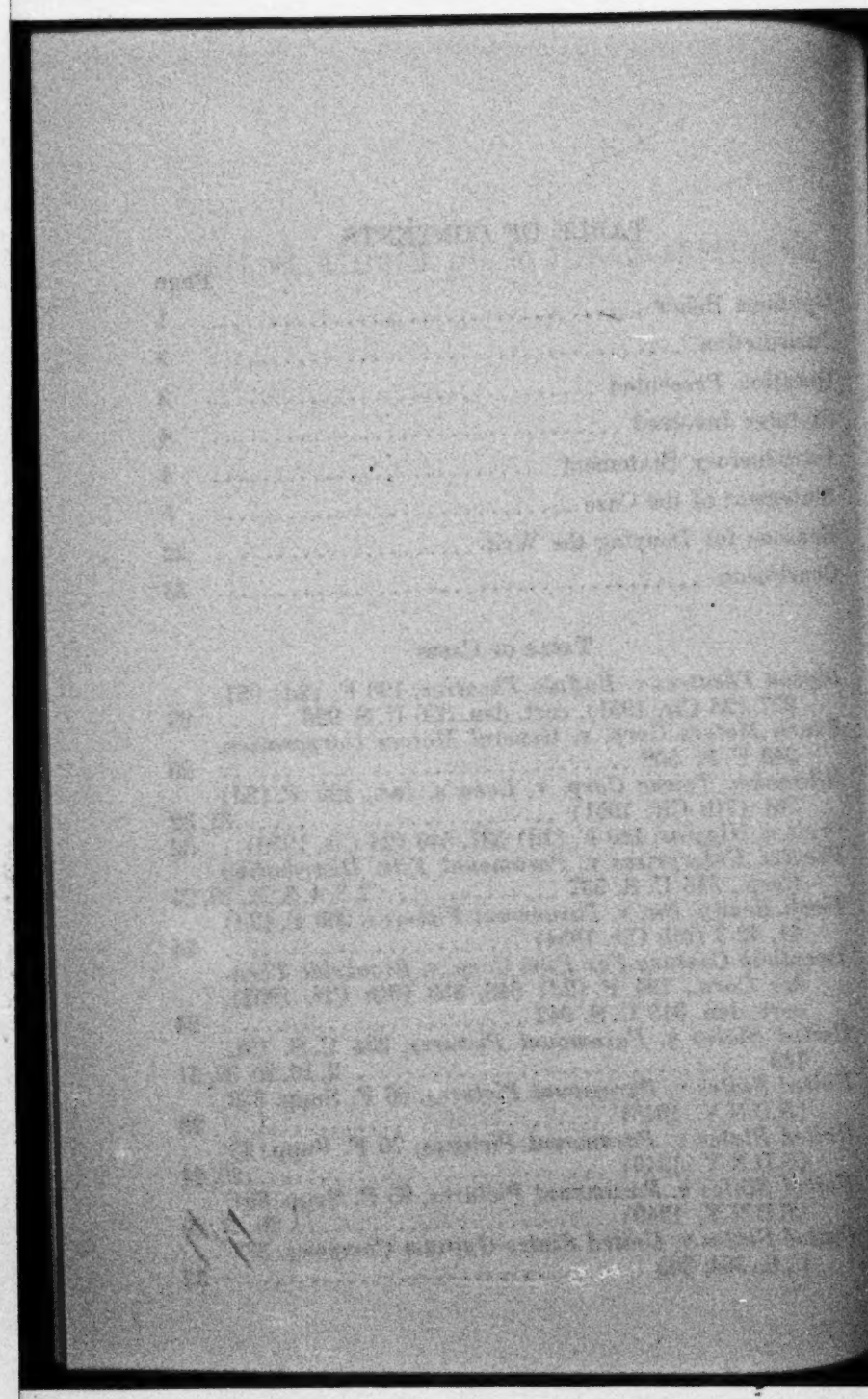

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 693 and No. 694

LOEW'S INCORPORATED, RKO RADIO PICTURES, INC. and TWENTIETH CENTURY-FOX FILM CORPORATION, *Petitioners,*

v.

CINEMA AMUSEMENTS, INC.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

(a) The District Court

Following a jury verdict in favor of Respondent, the trial Court denied defense motions for directed verdicts, judgment notwithstanding the verdict, and for a new trial on the ground that the evidence made a "typical case for

a jury" (R. 1070). He said among other things (R. 1069-1070).

> "The Court is satisfied—and whether my conclusion in that respect is right or wrong, I don't know—but I am satisfied and have been satisfied ever since the conclusion of the Plaintiff's case that there was sufficient evidence adduced by the plaintiff to take the case to the jury. I am not going into a detailed discussion of evidence because of the great volume and all that has been said about it. Some of it would be repetitive and I don't believe it would contribute anything to the situation at all. But I have had an abiding conclusion that evidence was sufficient to take the case to the jury.
>
> • • •
>
> I am a firm believer in the jury system. I believe that ordinarily with twelve men and women in the jury box, when it comes to resolving questions of the weight of evidence where it's in conflict, and particularly where the question for determination has to do with credibility of the witnesses, that they (sic) judgment is better than the ordinary judgment of one judge, and ordinarily more accurate based on the diversity of their pasts and of their contact with the various fields of activity."

(b) The Court of Appeals

The opinion of the United States Court of Appeals for the Tenth Circuit appears at page 1209-1222 of the record and is reported at 210 F. 2d 86.

The court below rejected Petitioners' contention that the 1950 final decree in *United States* v. *Paramount Pictures* had been erroneously admitted. Among the authorities it cited in support of the treatment of that decree by the District Court was the recent decision of this Court in *Theatre Enterprises* v. *Paramount Film Distributing*

Corp., 346 U.S. 537 (R. 1212). Concerning the exclusion of the 1940 consent decree, the Court said (R. 1213-14):

> "Whether the defendants had a right to license films which they produced or distributed for exhibition in theatres in which they had an interest was a matter of law to be covered in the instructions of the court . . . The instructions were a correct exposition of the principles of law governing the question."

On the basis of a detailed summary of the evidence (R. 1218-1221), the Court further overruled Petitioners' claim that there was insufficient evidence to support the findings of conspiracy. In the course of its opinion it pointed out that an "an appellate court will not judge the credibility of witnesses or weigh conflicting evidence. Instead, it will take that view of the evidence most favorable to the prevailing party and uphold the verdict if there is substantial evidence to support it. Lavender v. Kurn, 327 U.S. 645 . . ." (R. 1217).

JURISDICTION

The Court below entered its judgment on January 7, 1954 (R. 1222). Rehearing was denied February 26, 1954 (R. 1287). Jurisdiction is invoked under 28 U.S.C. § 1254 (1). The petition was filed April 17, 1954 and served April 20, 1954.

QUESTION PRESENTED

Whether a jury verdict, awarding damages to Respondent on a cause of action under the Sherman Act, is reversible either because (i) the trial's instructions or rulings on evidence were erroneous or (ii) because there was insufficient evidence to support the jury's finding of conspiracy against Petitioners?

STATUTES INVOLVED

This case was brought and tried for treble damages pursuant to the provisions of the Sherman Act of 1890 and the Clayton Act of 1914, 26 Stat., 209, 38 Stat. 730, 731, 737, 15 U.S.C. §§ 1, 2, 15, 16.

INTRODUCTORY STATEMENT

All of the questions raised by the petitions for certiorari involve the sufficiency of the evidence to support the verdict, with a single exception. That is the argument set out at pages 11 to 18 in the Petition in No. 693 that the final *Paramount* decree was not admissible in evidence. That is the only point of law which we can discover (except perhaps for the trivial contention that the original 1940 consent decree in the same case was erroneously excluded).

Briefly stated, the substance of the argument against the admissibility of the *Paramount* decree is this: that the "ultimate fact" determined by the *Paramount* decree, i.e., the existence of a nationwide conspiracy against independent theatre owners, cannot be used by a victim of that conspiracy to show its intent and purpose even though he introduces separate proof that the same conspiratorial conduct was in fact contemporaneously pursued against him in his own locality.

There is no merit in this argument. The *Theatre Enterprises* case on which the Petitioners rely does not support it. Rather, the *Theatre Enterprises* case holds to the exact contrary.

In *Theatre Enterprises* the trial court had charged, after admitting the *Paramount* decree in evidence, that it was necessary for the plaintiff also to show by "additional evidence" that the conspiracy found in the *Paramount* case had been carried out in Baltimore. This Court upheld that instruction. The instructions to the jury in this case

were the same (R. 20-22). Further, as shown by the opinion below (R. 1217-1221), the *Paramount* decree was admitted here only after Respondent had first established by a mass of competent and credible "additional evidence" that Petitioners pursued in Denver the identical practices which had been found in the *Paramount* case to be the result of collusion among Petitioners and the other major distributors.

As we will show below, the independent evidence introduced by Respondent in this case was sufficient to sustain the verdict in this case against Petitioners without reference to the *Paramount* decree. The jury believed this evidence. The trial court held it sufficient. The Court of Appeals reviewed it and affirmed the trial court. Petitioners are therefore reduced to the argument that the nationwide *Paramount* decree is inadmissible under any circumstances and regardless of what other proof is offered to establish conspiracy in a particular locality by the same parties through the same means and at the same time. The *Theatre Enterprises* case holds otherwise.

All the other questions raised by Petitioners are concerned only with the sufficiency of the evidence. Such questions are not grounds for certiorari under the Court's rules. Nevertheless, we believe it is our duty to the courts below to demonstrate that their decisions on the evidence are fully supported by the record and we will proceed to do so.

STATEMENT OF THE CASE

1. The Proceedings Below

These petitions seek review of the lower Court's judgment (R. 1222), sustaining a jury verdict in favor of Respondent (R. 1066-7), an independent, unaffiliated motion picture exhibitor (R. 91, 123). The verdict awarded damages solely on account of a conspiracy

among the three Petitioners, and the other five major motion picture distributors,[1] to deny first run motion pictures to the Broadway Theatre in Denver, Colorado (R. 1045-6, 1052, 1054, 1067).[2] The damage period ran from November 1, 1944, when Respondent succeeded a subsidiary of Petitioner Twentieth Century-Fox Film Corporation, as the lessee of the theatre (R. 670, 675, 1083), until the filing of the complaint herein, on June 14, 1946 (R. 187, 1054). The Petitioners, named as defendants in the complaint, were the three distributors who also owned exhibition theatre interests in Denver during that period (R. 144-6).

2. The Evidence

First run quality of the Broadway: The Broadway was concededly a qualified first run theatre, located in the heart of the hotel and restaurant district in downtown Denver (R. 250-251). Before reopening the Broadway on February 15, 1945 (R. 231), Respondent admittedly spent $30,000 for renovations (R. 978-980). Defense witnesses testified that the Broadway had played some first runs under the prior management (R. 863) and that it was a more desirable first run theatre than the Denham Theatre (R. 826), at which Paramount Pictures was satisfied to play all of its Denver first runs during the period in question (R. 95, 97, 476, 950). An expert witness called by Respondent rated the Broadway as superior to the Denham and equivalent to the Paramount (R. 239, 245), one of the two first run houses operated in Denver by Fox Inter-Mountain Theatres (hereinafter "Fox Theatres"), the wholly owned subsidiary of petitioner Twentieth Centry-Fox Film Corporation[3] (R. 144-5; 950-951).

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[1] Paramount, Warner Bros., United Artists, Universal and Columbia (R. 1045). Along with Petitioners, they were the vital sources of feature films (R. 258, 959).

[2] The jury was expressly instructed that damages could not be awarded for the denial of a moreover run to Respondent (R. 1052).

[3] Hereinafter "Fox Pictures".

First run experience of the Broadway: However, during the period February 15, 1945-June 14, 1946, the Broadway obtained a total of three first runs. Two were from an independent distributor named PRC (R. 537). From the hundreds of pictures distributed by Petitioners and their co-conspirators during that period (R. 477), the Broadway obtained just one first run—on a United Artists release called "Voice in the Wind" (R. 482-3). Respondent's repeated requests of all eight of the conspirators for first run product were otherwise uniformly refused. (R. 147-8; 177-8, 188-90, 289-90, 292-3, 475, 482-526, 538-9, 548, 560, 583, 643-644). Most of these requests were made orally in accordance with the custom of the industry, as described by an expert witness (R. 256-7), whose testimony was uncontroverted. But, these oral requests, and Respondent's desire for first run pictures, were substantiated not only by the three first runs it actually played, but also by written admissions of the conspirators and other corroborative evidence. See pp. 10-15, *infra*.[4]

Run and clearance practices of major distributors: It is undisputed that, with the lone exception of "Voice in the Wind", the entire first run product of all eight conspirators was licensed exclusively to four Denver theatres, each tied in with a major distributor, and that each distributor undeviatingly played his product at the same one of those theatres. Petitioners Loew's and RKO played their first runs exclusively at the *Orpheum*, operated by their jointly owned exhibition subsidiary (R. 144, 476, 830, 882). Fox Theatre's two first run houses, the *Paramount* and the *Denver*, got all of the first run releases of their parent, Fox Pictures, and, in addition, those of Warner Bros., Columbia, Universal and United Artists and of two smaller

[4] The testimony as to the oral first run requests was controverted only in the case of three Petitioners and only by their own employees (R. 824, 862, 865, 882, 894, 909-910). Not a single defense witness contradicted Respondent's testimony as to its requests of the other five distributors, described at pages 12-15, *infra*

non-conspirators, Republic and Monogram (R. 476, 950-951). All of Paramount's first run product was played at the Denham, the stock of which was partly held in the name of the wife of Paramount Pictures' Vice President and Sales Manager (R. 95, 97, 516).

Fox Theatres completely dominated the subsequent run situation in Denver. Its theatres, all the way down through fourth run, were also played by every one of the eight conspirators in advance of the Broadway (R. 96-9, 476, 569-570). Besides their systematized and undeviating first and subsequent run policies, all the conspirators followed an identical first run clearance of 45 days and their first run houses all charged an identical admission price of 74¢ (R. 92, 476, 478).

The late or last run position of the Broadway under independent operation had been forecast by petitioners immediately after Respondent leased the theatre, as shown by a memorandum of September 29, 1944, written by J. E. Flynn, Western Division Sales Manager for Loew's (R. 878). This recited that he gave the following answers to and inquiry from Respondent's official, Trueman Rembusch, as to whether the Broadway's previous "moveover" of Loew's and RKO first runs from the Orpheum, i.e., without an intervening clearance (R. 92), would be continued (R. 887-8):

> "That the moveover at the Broadway theatre was possible because the Orpheum Theatre had an interest in the Broadway . . . "
>
> "That . . . we sell the Esquire second run, and that something else that would interfere would be the Tabor-Victory, which is set up as fourth run in Denver . . . (T)he only run available would be after the Tabor-Victory."
>
> " . . . Said he would like me to write him these facts but I ducked, saying that my secretary had already left and that I was leaving town early in the morning. He then said he's getting the theatre and must have

pictures, and a moveover policy in the house is what he's concerned about . . . "

In fact, during the period involved in this case, Loew's did play the Broadway only after the "Tabor-Victory", which was even later than the neighborhood runs (R. 898, 570). After Respondent took possession of the Broadway on November 1, 1944, RKO similarly advised that it would not continue licensing a moveover run to the Broadway (R. 1133).

Stripping of the Broadway's equipment: Meanwhile, in September and October 1944, Respondent had tried to buy the Broadway's equipment. Fox Theatres declined to sell, on the pretext that it was in short supply and there was "immediate use" for it in the circuit's other theatres (R. 955, 965, 967). Instead it tried to buy Respondent's leasehold on the theatre for $5,000 or $10,000, but was refused (R. 670-1, 965-7). Before possession was transferred to Respondent, all of the Broadway's equipment was removed, including the marquee, projection and sound equipment, seats, carpeting, draperies, air conditioning, ventilation fans, stage curtains and electrical conduits (R. 917-919).[5] A week earlier a sign had been placed on the theatre which read "Present policy discontinued" (R. 675). The dismantling of the theatre forced Respondent to close it down and undertake expensive renovation, with the result that it could not be reopened until February 15, 1945 (R. 230-1, 616).

Moveover negotiations: After acquiring possession of the Broadway (on November 1, 1944), Respondent advised the Department of Justice of its difficulties in maintaining the theatre's previous moveover run from the Orpheum

[5] There was no evidence that any of the equipment was ever reused except the seats which were transferred to another house in Denver (R. 955), and the marquee which was ultimately broken up and used on two theatres in Wyoming after being kept in storage for two years (R. 916).

(R. 1134-6, 1139-40, 1142-3). Following pressure from the Department (R. 1147), a letter was written to Mr. Rembusch, under date of February 5, 1945, offering Respondent a moveover on terms requiring it pay 50% of the Broadway's profits, before taxes and officers' salaries, to the Orpheum's owner, i.e., the jointly owned subsidiary of petitioners Loew's and RKO (R. 467-8, 1148-9). This made no mention of film rental costs, as Respondent pointed out (R. 1162-4). It was finally developed in September 1945 that, in addition to dividing its profits with the Orpheum, Respondent would have to pay film rentals to Loew's and RKO equivalent to 45% of the Broadway's gross revenues (R. 426), based on a sliding scale formula providing a 50-50 split between the theatre and the distributors of receipts over a specified figure (R. 1112-3, 1168-9). Respondent accordingly declined the moveover for reasons expressed by one of its officers as follows (R. 425):

> "Well, let's analyze this. We are going to give 50 percent of our profits before taxes and before salaries to the Colorado Orpheum, our competitor, and we are going to give 50 percent to Metro-Goldwyn-Mayer and to RKO pictures. Where do we come in? And we decided not to sign it."[6]

Respondent's efforts to obtain first run pictures: With the moveover situation unresolved, the Broadway reopened on February 15, 1945. Respondent thereupon endeavoured to operate it as a first run house from that time until the filing of the complaint on June 14, 1946. This was established by incontrovertible evidence, including written admissions of the conspirators.

Shortly after the theatre opened it actually played a first run, the aforementioned United Artists release called

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[6] Actually the proferred profit-sharing terms for a moveover run contemplated the very kind of agreement which prompted this Court to say: "Clearer restraints of trade are difficult to imagine" (*United States* v. *Paramount Pictures*, 334 U.S. 131, 149).

"Voice in the Wind", paying percentage terms as is customary for first runs (R. 294). This picture thereafter got no subsequent run playoffs anywhere in the Fox Theatres circuit (R. 964). Respondent then tried to follow up in May 1945 with a first run on another United Artists' picture called "Mr. Emmanuel", negotiating chiefly through Mike Roth, its original manager (R. 294-5, 337-8). Respondent was first told the picture would be furnished on specified dates and accordingly undertook elaborate preparations for the showing, including extensive publicity (R. 295-6). But at the last moment the distributor declined to furnish the picture, claiming it was going to be sold to Fox Theatres (R. 296, 463). That the picture was withheld from the Broadway against United Artists' own best interests was dramatically shown by a telegram and letter, sent in late May and early June 1945, by its Denver Branch Manager, C. K. Olson, to his superior in Los Angeles, W. E. Callaway. The telegram read (R. 298):

> "Mike Roth of Broadway Theatre has done extensive preliminary work in advance on proposed showing Mr. Emmanuel. Unless Fox through Los Angeles instructs this office place picture near furture (sic) urgently recommend we show Emmanuel in Broadway as originally planned. Tentative date week starting June 7. Please advise".

The letter stated (R. 298-299):

> Mr. Emmanuel first run, Denver, is still being kicked around, and I honestly feel that it is to our best interest do (sic) dispose of this picture in the Broadway . . . a tie up with the Broadway would not only give us extensive publicity, but net us additional film rental . . . [Fox Theatres] will continue to stall and stall, the same as they did on Voice in the Wind . . .

The record does not show what "Fox through Los Angeles instruct[ed]" the United Artists' Denver office. But in

fact, Mr. Emmanuel never played either the Broadway or the Fox Theatres circuit (R. 463, 964).[7]

This episode and Respondent's anxiety for first run product was forcibly brought home to United Artists' top management. Rud Lohrenz, its District Manager in Chicago, subsequently wired Olson as follows (R. 300-301):

> "Have just talked with Truman Rembusch about the situation in the Broadway Theatre. He tells me that he is not too familiar with the mix-up on Mr. Emmanuel, and it was impossible to work out anything with him over the telephone. He did assure me, however, *that he was anxious to get some first run pictures* and would do anything possible to straighten the matter out to our satisfaction when he gets out there in about two weeks." (Emphasis supplied).

Nevertheless, Respondent later suffered two similar experiences in its efforts to get first run product from this source. In May 1946 Respondent signed a contract, and got first run playing dates from United Artists' Denver office, for a picture called "Colonel Blimp", which the Broadway advertised in the press for several days (R. 301-4). But the picture was never delivered, although Fox Theatres had declined it and did not play it anywhere in Denver (R. 302). What happened is disclosed by an exchange of telegrams between Olson and his superior in Chicago. Olson wired (R. 303):

> "Please check with Mr. Orr reference contract submitted Broadway Theatre *first run* Denver Colonel Blimp also Mr. Lazarus letter dated June 4, regarding

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[7] The quoted letter further said that Frank Ricketson, *Fox Theatres'* President, was "apparently" willing to let the Broadway play the picture (R. 299). Since the picture was nevertheless withheld, the jury could have inferred that the restraining force was the parent company, Petitioner *Fox Pictures*. This is consistent with the reference in the above quoted telegram to "Fox through Los Angeles". Fox Pictures had offices in Los Angeles (R. 928), but the operations of Fox Theatres were confined to the "Rocky Mountain Region", and Mr. Ricketson had been continuously stationed in Denver since 1935 (R. 145, 555-6, 949).

deal. Also discussed this with Mr. Unger over phone. Fox definitely will not play." (Emphasis supplied).

He got this answer on June 24, 1946, just two days before the scheduled run at the Broadway (R. 303):

> "Deal on Colonel Blimp for Broadway Theatre Denver rejected. *Do not serve him print under any circumstances.*" (Emphasis supplied).

The precise explanation was later forthcoming in a wire to Olson stating that Paul Lazarus, United Artists' executive, had rejected the Broadway for "Henry V", on which Respondent had started apparently successful first run negotiations in January 1946 (R. 486-92). This wire said (R. 492-3):

> "Regarding your telegram: Paul Lazarus, myself carefully considered Wolfberg's proposition and regret we cannot accept same. Stop. *For your private information Paul thinks as matter of company policy we should play Fox Intermountain,* and we have today closed with Esquire. Open about 19th February." (Emphasis supplied).

There was also uncontroverted evidence that other conspirators were likewise on notice of Respondent's desire to play first run product. In the fall of 1945, the Broadway had played a combination of two old Universal pictures for three weeks (R. 505-6, 536), thereby exceeding the run of all but one of the new top grossing features at Fox Theatres Denver or Paramount during the period in question (R. 127-9, 218-229). Respondent then vainly wrote Universal's New York headquarters as follows (R. 1094-5):

> "I was very glad that we were able to do so well with the Imitation of Life combination in the Broadway.
>
> "If you have any first runs you have trouble disposing of in Denver at any time you can bank on it

that we will be glad to cooperate and give it a profitable playoff."

Uncontradicted testimony also showed repeated, but likewise unsuccessful, oral requests for first run features of Universal's local personnel in Denver (R. 181-183, 290, 506-510).

No defense witnesses disputed Respondent's testimony of its similar frustration in attempting to get first runs from the other non-defendant distributors. Requests of Warner Bros. were futile (R. 188-190, 520-1, 525-6, 631, 651), despite the following letter of May 15, 1945, from E. A. Bell, its local Denver Manager, to Respondent, offering old pictures while complaining of the inadequacy of playing time in the recognized first run houses (R. 523):

> "The pictures listed on the attached have been reissued and thus far have only played one downtown run, namely, the Victory.
>
> "It seems to me their star value is such that they merit a Broadway run in view of the *very limited amount of time given to their first run*, which is no indication of the quality of the pictures *but is simply a matter of the first run houses being overloaded* and our being compelled to accept a Curtis Street first run for early liquidation. The pictures are now available and I would like to make a deal with you. When can we do it?" (Emphasis supplied).[8]

Efforts to get Columbia first run product elicited from R. C. Hill, its local Denver Manager, the following reasons why he accepted inferior terms from Fox Theatres in preference to better propositions from Respondent: that

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[8] Bell's explanation to Respondent of his refusal to play the Broadway was that his company's losses in the Denver Exchange were made up on Fox in Philadelphia, where Warner Bros. owned the theatres (R. 522). According to defense testimony, Fox Pictures did not play the Warner houses in the City of Philadelphia, but it was admitted that it did play them in the rest of the circuit served by the Philadelphia Exchange (R. 933, 936). Bell was not called as a witness.

he could not play the Broadway "because that would upset the Fox deal all over the country" (R. 518); and "Well, its Fox and there's nothing I can do about it" (R. 519). Paramount ignored first run requests from Respondent and used only the Denham (R. 178, 289-90, 515-6), which even defense testimony conceded was inferior to the Broadway (R. 826).

Petitioners, as well as their co-conspirators, were fully aware of Respondent's desire to operate the Broadway on a first run basis. In Loew's case, this was shown not only by Respondent's oral testimony (R. 147-9, 540-543), but also by the following intracompany writing, signed by Friedel, Loew's Denver Manager (R. 893, 1178):

> "In discussing the deal in the Mission Theatre, Denver with Mr. John Wolfberg, he asked me if Portrait of Maria and Last Chance would be played in the Orpheum Theatre, in Denver.
>
> "I believe he would be interested in playing these pictures in the Broadway Theatre, Denver in the event the Orpheum Theatre would release them.
>
> "I would appreciate your advising me in regard to this."
>
> "cc Mr. Flynn."[9]

The knowledge of Petitioner Fox Pictures that Respondent desired first run product was disclosed by the previously quoted United Artists documents, pp. 11-12, n. 7. *supra*. These described discussions with officials of its wholly-owned subsidiary concerning the availability of playing dates for "Voice in the Wind", "Mr. Emmanuel"

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[9] In fact these two pictures and another called "Boys Ranch", all second features (i.e., supporting pictures on a double bill), were offered to the Broadway as first features, but were declined because of their wretchedly inferior quality and the exorbitant rentals demanded (R. 148, 542-3, 585). After this action was filed, two of them were played at the Orpheum on the terms offered to Respondent, contrary to the previous practice of Petitioner Loew's with respect to such product (R. 585, 658, 895, 1179).

and specifically covered Respondent's interest in obtaining the pictures for first run exhibition at the Broadway. Respondent's evidence also described negotiations for first runs with a Mr. Abeles, Petitioner Fox Pictures' Branch Manager in Denver, who was not called by the defense, and with two other of its officials who denied such negotiations (R. 177-8, 538-9, 903, 909-910).

Petitioner RKO's notice was specifically apparent from testimony concerning Respondent's efforts to obtain first runs on particular Walt Disney and Samuel Goldwyn pictures, which were distributed by RKO (R. 828). Respondent's superior offers for such product were rejected in favor of Fox Theatres' outlets (R. 158, 170-176, 560-565, 846-8).[10] Respondent got only last runs from RKO (R. 560), although that company's officials admittedly knew the Broadway was a qualified first run house, had played occasional first runs, and that Respondent claimed great difficulty in getting product (R. 826, 863, 867).

There was also other evidence pointing to Petitioners' knowledge both that Respondent wanted first run product and that all major distributors were boycotting it. Respondent's desire for first runs was conveyed by its actual first runs on "Voice in the Wind" and two pictures distributed by PRC (R. 537). It was also shown by the publicity and advertisements in the press of the Broadway's originally scheduled, but subsequently aborted, first runs on "Mr. Emmanuel" and "Colonel Blimp" (R. 296, 304). That each of the conspirators knew that all were ignoring the Broadway as a first run outlet is further indicated by the kind of form used for box office reports from exhibitors to distributors. An actual report to Loew's, for example, called for specification of "opposi-

[10] RKO's objection that these pictures were licensed after the date of the complaint is not well founded. The evidence was properly admitted, over RKO's motion to strike, pursuant to the Court's ruling that events after June 14, 1946 could be shown if they were related to negotiations commenced prior to that time (R. 164-5, 799-800, 811-813).

tion" pictures and theatres (R. 1179). In addition, the record included the admission, on cross-examination, of Loew's Assistant General Sales Manager (R. 877), that the major distributors held "certain meetings" in New York, where his company's policy was made (R. 890-892).[11]

Financial Detriment of Denver Policies to Distributors: Petitioners and their co-conspirators boycotted the Broadway as a first run outlet contrary to their own financial interests. Due to their exclusive use of the four affiliated theatres for first run exhibitions (R. 829-30, 882, 950-951), those houses were "overloaded", as the Warner Bros. Denver branch manager expressly admitted (p. 14, *supra*). The United Artists memorandum concerning "Mr. Emmanuel" was to the same effect, referring to the fact that Fox Theatres' circuit and Denver booking officials "both are still of the opinion they don't know how or where they can work in a booking, despite the fact that Rick Ricketson put himself on record that some arrangements could be made to run the picture" (R. 299). Agren, the Denver booker, later replied as follows to an inquiry from the Broadway's manager as to when a certain picture would be shown on first run: "Lord, I don't know. I've got so much product it's coming out of my ears" (R. 523-4).

Under these circumstances, the four chosen theatres generally played first run pictures for only one week (R. 477-8). This meant an actual loss of revenue, since first runs play at higher admission charges and the distributors obtain a higher percentage participation in receipts from first run exhibitions (R. 250, 254, 478, 833).

The adverse financial effects upon the three Petitioners here was specifically apparent from the evidence. For example, between November 1, 1944 and June 11, 1946,

[11] On redirect examination he said that he had no definite recollection of attending the meetings, but "some of the things" discussed were public service matters (R. 891-2). The defense made no other effort to explain these meetings.

forty-nine RKO releases played first run at the Orpheum (R. 651-2). Thirty-two of these were played for only one week, sixteen for two weeks and just one for as long as three weeks (R. 651-2). Nevertheless, not only RKO, but also Petitioner Loew's persisted in playing all first runs at the Orpheum (R. 830, 882). Petitioner Fox Pictures played its first runs under similar or worse conditions. They were exhibited exclusively at its subsidiary's Denver and Paramount Theatres (R. 931-2). So were the releases of four of its co-conspirators—Warner Brothers, United Artists, Columbia and Universal and also those of two other producers, Republic and Monogram (R. 476). Under these conditions, even the four highest grossing pictures at the Denver, Fox Theatres' better first run house, got only a two weeks run (R. 218, 224, 226, 227).

In accepting one week first runs at their affiliated theatres, Petitioners acted contrary to the ordinary interest and practice of distributors to get extended first runs (R. 254-5). While the acceptance of such limited first run playing time presumably did not reduce Petitioners' first run profits in their capacity as exhibitors, it curtailed their profits as distributors from their percentage participation in exhibition receipts from first run play-offs of their pictures (R. 254, 478). This would have been avoided and over-all first run playing time increased, by using the Broadway for some of Petitioners' first run releases and increasing the length of first run play-offs at their affiliated houses. Petitioners offered no evidence concerning potential returns under such a policy, compared with their uniform practice to refuse to license the Broadway for first run exhibitions and to accept, instead short first runs at the affiliated houses. Petitioners Loew's and RKO, as joint owners, shared the first run exhibition profits of the Orpheum, but retained the entire first run distribution profits from their own pictures. Even RKO's own President would not deny that a long first run at the Broadway might have been more desirable than a short one at the Orpheum (R. 830-831).

The record shows that, in fact, Respondent offered the conspirators extended first run playing time at the Broadway and that they would have benefited from its use. As previously mentioned, the Broadway ran two old reissued Universal pictures for three weeks (R. 505). In writing the distributor about this, and requesting first run product, Respondent stated (R. 1094-5):

> "It is true that our Broadway Theatre has smaller seating capacity than the Denver but when we hold a picture for extended playing time I am sure your earnings are much greater than you would have obtained from the Denver play-off".

Similar offers of extended playing time were futilely made to other distributors, including all three Petitioners (R. 489, 517-8, 525-6, 539, 546-7, 560-565). The advantage of long first runs at the Broadway, contrasted with short ones at the affiliated houses, is disclosed by the table set out below. It shows the following comparative receipts for the four highest grossing pictures at the Broadway in 1949, when it finally got first run pictures,[12] and from the four top pictures at the Denver, Paramount and Denham during the time covered by the complaint in this action (R. 127-9, 218-29, 758):

	Broadway [1000]	Paramount [2200]	Denver [2500]	Denham [1660]
1	59,780 (7)	49,651 (3)	38,353 (2)	66,817 (5)
2	52,115 (8⅓)	40,203	37,805 (2)	45,643 (5)
3	48,355 (6)	26,644	36,000 (2)	40,607 (4)
4	42,890 (6)	14,919	33,217 (2)	39,655 (4)

(Note: Figures in brackets show seating capacity, those in parenthesis, number of weeks played)

No specific receipts were shown for the Orpheum, with a seating capacity of 2600 (R. 829), but only one of its pictures during the period covered by the complaint

[12] These figures were admitted with reference solely to the question of the Broadway's suitability for first run films (R. 127).

yielded as much revenue as any of the four listed for the Broadway in the foregoing table (R. 652).[13]

3. The Trial Court's Rulings on the Paramount Decrees

The 1950 decree: At the close of Respondent's case, the District Court, expressly applying the rule of *Emich Motors Corp.* v. *General Motors Corporation*, 340 U.S. 558, admitted in evidence, as to defendants Loew's and Fox, but not RKO (R. 22), portions of the final decree entered February 8, 1950 in *United States* v. *Paramount Pictures*, 334 U.S. 131, 85 F. Supp. 881 (S.D. N.Y. 1949). (R. 73-74, 788-789).[14] Among the injunctive provisions admitted were those prohibiting defendants from agreeing "to maintain a system of clearances" and from "discrimination in favor of affiliated theatres" (R. 1100-1101). In submitting the case to the jury, the Court first instructed that the decree was *prima facie* evidence only as to matters "put in issue and directly determined in the Paramount case" and next explained the meaning of the term "*prima facie*" evidence (R. 20). He then informed the jury of the significance of the decree by quoting pertinent parts of the *Paramount* Court's findings of fact and conclusions of law (R. 21), including the determinations that the defendants there had violated the antitrust laws in the following ways (see 70 F. Supp. 53, at 72):

> "By conspiring with each other to maintain a nationwide system of runs and clearances substantially uniform in each local competitive area;
>
> • • •
>
> "By having collectively the monopoly power to exclude and the intent to exclude and affecting the actual exclusion of independent exhibitors from the

[13] It was undenied that the theatres enjoyed their peak earnings during the earlier period used for Petitioners' affiliated theatres (R. 128).

[14] Following the decision in that case RKO had entered into a consent decree (R. 73-74).

first run market and restricting the distribution of motion pictures to independent exhibitors."

This was followed by instructions that the jury could consider the decree only if Respondents established by other evidence that the same course of conduct found to have been pursued through the country in the *Paramount* case had been specifically practiced in Denver (R. 21-22). In so doing the Court emphasized as follows that the decree of itself was not evidence of any misconduct in Denver (*ibid*):

> . . . "Now, I wish to instruct you that neither the admission in evidence of the Paramount decree nor my recitals of its findings establish any facts as to the activities of the defendants Loew's and Twentieth Century-Fox with respect to the Broadway Theatre in Denver, Colorado".
>
> . . . In other words you cannot return a verdict against Loew's or Twentieth Century-Fox only because they were unsuccessful litigants in the suit with the Government in New York.

The 1940 decree: The Court at first admitted and then, on its own motion, struck paragraph XVII of the consent decree of 1940 in the same *Paramount* case (R. 309-10, 749). Respondent wanted to allow the admission of this portion of the decree and to introduce the balance of the decree (R. 309-310). The Court ruled that "contrary to the contention of both sides", no part of that decree should be admitted because if it were, the jury would be "put in the position of passing on a question of law" (R. 748-749). However, the Court's instructions repeatedly stressed the right of Petitioners to play their pictures in their own affiliated theatres (R. 1051-2). It said, for example (*ibid*):

> "If each of the defendants acted independently in licensing its films to a theatre or theatres in which it may have had a financial interest, then even though the licensing terms were similar or identical in certain respects, there was no violation of the law and the

plaintiff is not entitled to recover in this case unless such licensing contracts were the result of a conspiracy.

* * *

Each distributor acting alone and in its own interest and not in combination with others has the right to license its features to any exhibitor which it may select, and may exercise its own judgment with regard to the rental terms upon which its feature films should be exhibited.

Similar or identical action on the part of two or more of the defendants or one of the defendants and one or more of the alleged co-conspirators is not in itself and of itself and standing alone sufficient to warrant the inference of an illegal agreement or combination among them."

* * *

REASONS FOR DENYING THE WRIT

No recognized purpose would be served by granting the writs prayed by the instant petitions. As shown below, both lower courts strictly followed traditional principles of law established in decisions of this Court; the evidence amply sustained the jury's verdict; and there is no conflict with decisions of any other Court of Appeals.

1. The lower courts correctly allowed and sustained the admission of the final Paramount decree

There is nothing in *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, which warrants further review of this case. No question is present here as to the necessity or propriety of a directed verdict on the issue of conspiracy. That issue was committed to and decided solely by the jury (R. 1051-2, 1058-9, 1066-7). Contrary to Petitioners' insinuation (Pet. No. 693, p. 16), there was no ruling that the "Paramount case . . . was conclusive of the question of conspiracy among the distributor

defendants'"[15] or of any other question. Rather, the trial court here was especially careful to instruct the jury to the contrary (R. 20-22).

In *Theatre Enterprises*, this Court carefully noted these facts: Plaintiff's theatre was "located in a neighborhood shopping district some six miles from the downtown shopping center in Baltimore" (346 U.S. at 539). The record showed that "independent exhibitors in Baltimore . . . account for 63% of first-run exhibitions" (*id.* at 540). "The *Paramount* case involved a conspiracy found to exist as of 1945 and enjoined no later than June 25, 1948", whereas the case before the Court "involved a claimed damaged period running from February 1949 to March 1950 (*id.* at 543-544). Those facts underlay its remark that "the relevancy of *Paramount* to the *instant case* is slight" (*ibid;* emphasis supplied). Even so, the Court in *Theatre Enterprises* declined to rule that "petitioner was entitled to no benefit at all from the earlier decrees" (*ibid*).

In contrast, this Respondent's Broadway theatre was a *downtown* house of admitted first run caliber (p. 6 *supra*). First runs in Denver were monopolized by affiliated exhibitors (pp. 7-8 *supra*). The year 1945 was included in the damage period, which terminated with the filing of the complaint herein on June 14, 1946 (R. 187). This was just three days after the original opinion of the trial was issued in the *Paramount* case. *United States* v. *Paramount Pictures*, 66 F. Supp. 323 (S.D. N.Y. 1946).

Furthermore, the admission of and the instructions concerning the *Paramount* decree in this case were entirely consistent with the views expressed by this Court in the *Theatre Enterprises* case, as the Court below held (R. 1212). The Court there expressly reaffirmed the trial court's "discretion to choose the precise manner of explaining a decree to the jury" (346 U.S. at 542). In fact,

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[15] *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951, 957 (2d Cir. 1951), cert. denied, 326 U.S. 926.

the instructions to the jury in this case were in strict accord with the statement in *Theatre Enterprises*, that "additional evidence was required to relate the presumed *Paramount* conspiracy to [Denver] and to the claimed damage period" (346 U.S. at 543). See R. 20-22.

Nor can there be any question of the sufficiency of the "additional evidence" in this record to allow the jury and lower courts here "to relate" to Denver the nation-wide conspiracy found in the *Paramount* case. As shown by the Expediting Court's findings and conclusions (*United States* v. *Paramount Pictures*, 70 F. Supp. 53, 72 (S.D. N.Y. 1946), it was there "distinctly put in issue and directly determined" (Pet. No. 693, p. 12), that these Petitioners had violated the Sherman Act by

> "Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area:
>
> * * * * *
>
> Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, runs, clearance and other terms".

In this case Respondent's "additional evidence" so abundantly proved pursuit of the identical practices in the "local competitive area" of Denver, during a period coinciding with the nation-wide conspiracy, that it would have been reversible error to exclude the *Paramount* decree. *Tivoli Realty, Inc.* v. *Paramount Pictures*, 209 F. 2d 41, 42-3 (5th Cir. 1954) [citing this Court's decision in *Theatre Enterprises*]; *cf. Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 853 (8th Cir. 1952), cert. denied 343 U.S. 942.

The "additional evidence" is set out at pp. 6 to 20, *supra*, and is summarized in the immediately following section of this brief.[16]

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[16] Petitioners misconceive the function of the *Paramount* decree in asserting that it was improperly used to prove the so-called

2. Independently of the Paramount decree, the evidence amply established a conspiracy to deprive the Broadway of first run pictures

Respondent's "additional evidence", independently of the *Paramount decree,* was sufficient to support the jury's finding of conspiracy. Briefly summarized that evidence established the following facts: Throughout the relevant period Petitioners and their five co-conspirators uniformly played first run features only at four theatres with which one or more of them was linked; these first run houses uniformly charged a 74¢ admission price; each distributor uniformly gave its first runs to the same particular affiliated exhibitor; all of them uniformly observed a 45-day first run clearance policy; each invariably played subsequent runs at theatres affiliated with Petitioner Fox Pictures before offering them to Respondent's theatre, the Broadway, on late or last run. See pp. 7-8, *supra.* The concentration of first run product among the four preferred houses in Denver concededly resulted in "the first run houses being overloaded" (R. 523) and unable to afford adequate playing time, with a resultant loss of revenue to the distributors. See pp. 17-20, *supra.*[17] The Broadway was an independent downtown theatre admitted by a defense witness to be suitable for first runs (R. 821, 826) and there was ample additional proof to that effect.

"mediate fact" of a national conspiracy (Pet., No. 693, pp. 16-17). Using their language, the "mediate fact" here was the major distributors' pattern of conduct in Denver. That was proved not by the *Paramount decree,* but by the independent evidence introduced at the trial. The "ultimate fact" was the innocent (i.e., coincidental) or improper (i.e., concerted) quality of that conduct. Since the *Paramount* Court had considered and determined the quality of the very same pattern of conduct, its decree was *prima facie* evidence of the same ultimate fact in this case.

[17] In the cases of Petitioners Loew's and RKO, the resultant loss of revenue in Denver was further accentuated by the circumstance that they owned the Orpheum jointly. Hence each received only 50% of the first run exhibition profits in Denver, compared with 100% of the first run distribution profits on its own pictures.

See p. 6, *supra*. During the period in question, save for one isolated instance, Respondent's repeated requests for first run products were unheeded by all eight major distributors, even on pictures which got no first run at all in Denver, again contrary to the distributor's own financial interest. See pp. 7-17, *supra*. Respondent actually played three first runs, including two from an independent distributor. See pp. 7, 10-11, *supra*. It publicly advertised two others on pictures withheld at the last moment by one of the conspirators. See pp. 11, 12, *supra*. The major distributors' general sales managers held recurrent meetings in New York. P. 17, *supra*.

This evidence showed the operation in Denver of the exact conspiracy condemned in the *Paramount* case. The following words of the Court in that case aptly describe the facts proved here with reference to Denver (*United States* v. *Paramount Pictures*, 85 F. Supp. 881, 893, 894, 895 (S.D. N.Y. 1949)):

> ". . . even in the relatively few areas where more than one of the major defendants had theatres, competition for first run licensing privileges was generally absent because the defendants customarily adhered to a set method in the distribution and playing of their films. In substantiation of the general picture, the plaintiff has shown, on the basis of a study of four seasons between the years 1936 and 1944, that during this period the privilege of first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool or an arbitrary division of the product known as a 'split'. The lack of competition which we have described has undoubtedly been induced in large measure by the reliance of the defendants on each other in obtaining pictures for use in their various theatres throughout the country. The defendants were also dependent on one another to obtain theatre outlets for their own pictures, for the best customers of any defendant were ordinarily one or more of the other defendants.

"We think that there can hardly be adequate competition among the defendants where such interdependence exists. Moreover, when the defendants were interdependent as to a great part of their activities, *it necessary would affect not only competition among themselves, but with independents.* We have already found such effects in the various concerted practices of the defendants which have restricted competition with independents . . ."

* * *

"In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. *There was a horizontal conspiracy as to price-fixing, runs and clearances. The vertical integrations aided such a conspiracy at every point.* In these circumstances, the defendants must be viewed collectively rather than independently as to the power which they exercised over the market by their theatre holdings . . ."

* * *

"Furthermore, the power to fix clearances and runs which we have found existed and was exercised by the major defendants was in itself *a power to exclude independents who were competitors, and was accompanied by actual exclusion.*" (Emphasis supplied).

This was the exact situation which obtained in Denver during its damage period in this case. As noted above, each Petitioner and the other distributors played first runs exclusively at the affiliated theatres and never deviated from one of those theatres to another; their first run clearance time was uniformly 45 days; and the admission price at each first run theatre was identical. See pp. 7-8, *supra.* The horizontal conspiracy in Denver was similarly implemented by "vertical" i.e., producer-exhibitor, integrations and each Petitioner was a party to them. Fox Pictures had a subsidiary-owned circuit dominating the Denver situation from first run to subsequent runs. Loew's and RKO were joint owners of the Orpheum and were thereby engaged in the very kind of joint integration which this Court condemned in the

Paramount case as an unlawful "device for strengthening their competitive position as exhibitors for forming an alliance as distributors" (334 U.S. 131, at 150-151). Concerning the type of moveover arrangement effected in Denver betwen Loew's and RKO, on the one hand, and Fox Pictures on the other (but which Respondent declined), the Court there said: "Clearer restraints of trade are difficult to imagine" (*Id.* at 149).

Through these integrations, combining control of the Denver exhibition houses, especially first run, with domination of the distribution field, the conspiracy was made diabolically effective against the independent competition of Respondent's admittedly suitable first run theatre. The conspirators were thereby enabled to swallow up all first run products, posing the threat of refusing outlets for the product of any rebellious distributors. At the same time they were enabled to insure that first run product would be withheld from competing independent exhibitors. The record here shows, for example, that the one United Artists picture which did play first run at the Broadway got no subsequent run in Denver, after which that distributor thereafter refused plaintiff's offers, even on product which got no Denver first runs whatever. See pp. 10-13, *supra*.

On this record the argument that there was no basis for the verdict of conspiracy against any of these defendants in Denver necessarily presupposes the lack of any foundation for the determination of conspiracy against them in the nation-wide *Paramount* action. The cases are indistinguishable. It taxes credulity to urge that what was found there to derive from concerted action was the result of mere happenstance in Denver—particularly since the time of the Denver events coincided with the period of the national conspiracy.

There is no substance in Petitioners' piecemeal efforts to avoid the verdict of conspiracy. RKO attempts a separate challenge to the verdict below, based on the un-

availability of the *Paramount* decree as *prima facie* against it (Pet., No. 694, p. 3). This attempt founders on the complete identity between the proof as to the Denver conspiracy in this case and the evidence of the contemporaneous overall conspiracy in the nation-wide case. Respondent's case against RKO, as well as the other Petitioners, rests on independent proof of the very same pattern of conduct which was held sufficient to sustain a finding of conspiracy in the national case. "In these circumstances, the defendants must be viewed collectively rather than independently as to the power which they exercised over the market by their theatre holdings" (*United States* v. *Paramount Pictures*, 85 F. Supp. 881, 894 (S.D. N.Y. 1949). No prior decree was available or necessary as *prima facie* evidence against any of the defendants in the *Paramount* case and none was necessary on the record in this one.

It is hard to view seriously Fox Pictures' claim that there was no evidence "linking" it with its wholly-owned subsidiary, *Fox Inter-Mountain Theatres*. This is urged on the ground that there were no inter-locking officers and directors. (Pet. No. 693, n. 10, pp. 24-25). But no such interlocks are needed to afford a parent control of its subsidiary. More effective control is insured by stock ownership.[18]

The plea that a verdict of innocence is dictated by the moveover negotiations is equally unpersuasive. When the

[18] Furthermore, the record otherwise established *Fox Pictures'* domination of the local Denver scene. There was no contradiction of the testimony that the local Denver manager of one of the major distributors explained that he could not play the Broadway on first run because it "would upset the Fox deal all over the country" (R. 518). This reference clearly meant Petitioner Fox Pictures. In 1945 it had more than 600 affiliated theatres in various parts of the nation, including 17 cities with populations of more than 100,000 and 177 smaller towns. *United States* v. *Paramount Pictures*, 85 F. Supp. 881, 889, 890-891 (S.D. N.Y. 1949). The operations of Fox Inter-Mountain Theatres covered only the Rocky Mountain area (R. 555-6). See also p. 12, n. 7, *supra*.

Broadway reopened on February 15, 1945, Respondent had not accepted the illegal and exorbitant terms just offered by the jointly-owned subsidiary of Petitioners' RKO and Loew's, under date of February 5, 1945 (p. 10, *supra*). Respondent then promptly endeavoured to get first run pictures (pp. 10-11, *supra*). The Broadway being an admittedly qualified theatre, it could not be denied first runs on the pretext that Respondent had been offered and failed to accept the "moveover" terms dictated by the conspirators.[19] On the same "moveover" theory, Petitioners could and should have refused the late or last run product which they gave the Broadway. They certainly knew the theatre was open and needed product. They also knew Respondent wanted first runs; disregarding the oral testimony, there is no denying the Broadway had played a first run soon after it was reopened and had advertised another (pp. 10-11, *supra*). It defies commonsense, and is contrary to the jury's rejection of Petitioners' testimony (e.g., R. 862, 894, 909), to believe that because the moveover negotiations were pending, Respondent preferred last run pictures to the first run product which this Court has characterized as "the cream of the exhibition business" (*United States* v. *Paramount Pictures*, 334 U.S., 131, 166). Finally, following the collapse of the moveover negotiations in the summer or fall of 1945 (R. 691-692), the conspirators treated the Broadway exactly as they had while the negotiations were in progress. Respondent's experience in the effort to get a first run on "Colonel Blimp" in May and June 1946 was exactly the same as its experience with "Mr. Emmanuel" in May and June 1945. See pp. 11-13, *supra*.

There was no error in excluding Section XVII of the 1940 consent decree from the jury. In this Court's words

[19] It is wholly immaterial that Petitioner Fox Pictures' exhibition subsidiary may have previously operated the Broadway on the same terms. The Fox combine dominated the entire Denver situation and was reaping the lion's share of the conspiracy in that locality.

(*United States* v. *Paramount Pictures*, 334 U.S. 131, 141, n. 3):

> "Before trial negotiations for a settlement were undertaken. As a result, a consent decree against the five major defendants was entered November 20, 1940. The consent decree contained no admission of violation of law and *adjudicated no issue of fact or law*, except that the complaint stated a cause of action. The decree reserved to the United States the right at the end of three-year trial period to seek the relief prayed for in the amended complaint. After the end of the three-year period the United States moved for trial against all the defendants." (Emphasis supplied).

The lower courts correctly ruled that Petitioners' prerogative to play their own affiliated theatres was a question of law to be covered in the charge to the jury (R. 748-749, 1213-1214). In fact, it was adequately covered in the instructions. See pp. 21-22, *supra*. The provision in the 1940 consent decree concerning that prerogative was no more admissible in Respondents' favor than the many other provisions describing prohibited practices could have been admitted against them. Moreover there was no prejudice from the exclusion of Section XVII. The jury had before it the testimony of each Petitioner that its policy was to prefer its affiliated theatres; that the policy had been independently adopted as financially advantageous without consulting anyone else; and that it had not participated in any conspiracy to refuse product to the Broadway (R. 830-831, 882-4, 931-4, 956-7).

3. The decision below is not in conflict with any other case

There is no merit in the suggestion that the decision below conflicts with *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951). Plaintiff there claimed to have made oral requests for first run pictures before

it remodeled a second run theatre. There was no corroborative evidence. Following the remodeling, plaintiff wrote the defendants: "*We are now desirous* of negotiating with you for first run product in the City of Milwaukee" (190 F. 2d at 567; emphasis in original). This fact, among others, moved the Court to find that prior to the remodeling, plaintiff, itself, had recognized that its "theatre, upon acquirement, was not suitable for first run pictures" (*ibid*).

In contrast, in the present case there was written corroboration of the oral first run requests; the renovations were completed before Respondent commenced operations; and the Broadway's suitability as a first run theatre was attested not only by Respondent's management and its expert witness, but also by a witness for Petitioner RKO and by the written intracompany communications of United Artists. See pp. 6, 11-12, *supra*. Finally, *Milwaukee Towne* did not involve a jury verdict. It is fundamental "that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's findings" (*Orvis* v. *Higgins*, 180 F. 2d 537, 540 (2d Cir. 1950)). Or, in this Court's words (*United States* v. *United States Gypsum Company*, 333 U.S. 364, 395):

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitation of findings by administrative agencies or by a jury, this Court may reverse the findings of fact by a trial court where 'clearly erroneous' ".

CONCLUSION

The present case raises no substantial question which requires decision by this Court. The holding below is not in conflict with the decision of any other Court of Appeals. Under familiar principles the jury's verdict on the facts will not be disturbed upon appellate review. The petitions for certiorari should accordingly be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

LOEW'S INCORPORATED, RKO RADIO PICTURES, INC. and TWENTIETH CENTURY-FOX FILM CORPORATION, *Petitioners,* *vs.* CINEMA AMUSEMENTS, INC., *Respondent.*	No. 693

REPLY BRIEF OF LOEW'S INCORPORATED AND TWENTIETH CENTURY-FOX FILM CORPORATION IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT

The major portion of respondent's brief is concerned with additional evidence which it contends is adequate to sustain the verdict independently of the *Paramount* decree (Br. p. 25). We do not conceive it to be the proper function of this reply brief to analyze the evidence referred to or to point out the many respects in which it is either incomplete, inaccurate or not in any way related to any petitioner. None of it militates against petitioners' position that substantial questions of law are raised by the petition which should be decided by this Court. This reply

brief is concerned solely with respondent's argument concerning the *Paramount* decree.

ARGUMENT

It is petitioners' position that the admission against petitioners Loew's and Twentieth Century-Fox of the decree in the *Paramount* case as *prima facie* evidence of a conspiracy in Denver constituted reversible error.

As we have urged in our petition, the *Paramount* decree could only be admissible as *prima facie* evidence in this case with respect to such facts as were "distinctly put in issue and directly determined" in that case and which would be ultimate facts in this case. The ultimate fact involved here was whether petitioners conspired to injure respondent in its operation of the Broadway theatre in Denver. Respondent argues that this ultimate fact was "distinctly put in issue and directly determined" in the *Paramount* case. In support of that contention, respondent refers to two conclusions of law entered by the Expediting Court in that case (Br. p. 24). It ignores, however, the fact that those conclusions were based on the statistical case made out by the Government with respect to operations on a national level and the holding of that court that there was not "sufficient evidence to support an inference that the major defendants" had "entered upon a general policy of discriminating against independents. . . ." Respondent also fails to mention the statement of the Expediting Court that "the decision of such controversies [over clearances and runs in private treble damage actions] . . . should be left to local suits in the area concerned. . . ." *United States* v. *Paramount Pictures,*

66 F. Supp. 323, 342, 345. The other authorities set forth in the petition are likewise directly contrary to respondent's contention as to the scope and effect of the *Paramount* decree. Respondent does not mention those authorities.

The error of the courts below is pointed up by the discussion which appears in footnote 16 of respondent's brief (pp. 24-25). There respondent concedes that the ultimate fact here was the existence of a local conspiracy in Denver —in respondent's language, the innocent or improper quality of defendants' conduct in Denver. Respondent then recognizes that the *Paramount* decree was admitted and used in this case as *prima facie* evidence of the ultimate fact of a conspiracy in Denver. Yet, as we have shown, that fact was never put in issue or determined in the *Paramount* case. We again point out that if the United States had been the plaintiff in an action with respect to the local situation in Denver, nothing in the *Paramount* case decree would have operated as an estoppel in its favor. Petitioners would still have been entitled to contest the issue of the existence of a local conspiracy to deprive respondent of first-run pictures. Since the decree could not create an estoppel in favor of the United States (plaintiff in the *Paramount* case) with respect to Denver, it was inadmissible in this case as *prima facie* evidence against petitioners.

Respondent's contention that the *Paramount* decree adjudicated the existence of a conspiracy in a particular city (here Denver) is contrary to the holding of this Court in *Theatre Enterprises* v. *Paramount*, 346 U. S. 537. The same contention was rejected by the Court of Appeals in *Dipson Theatres* v. *Buffalo Theatres*, 190 F. (2d) 951 (2nd Cir. 1951), *cert. den.* 342 U. S. 926, and, as we have noted above, it is likewise contrary to the opinion of the Ex-

pediting Court in the *Paramount* case itself. As this Court said in *Theatres Enterprises*:

> "The *Paramount* decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the nub of plaintiff's claim." (346 U. S. 537, 543)

Respondent seeks to minimize the error of the courts below by urging that there was evidence "additional" to the *Paramount* decree which could sustain the verdict (Br. p. 25). But that is not the issue here. It is no answer to petitioners' contention concerning the improper treatment of the *Paramount* decree to argue that independently of the decree there was sufficient evidence to support a verdict of the jury in respondent's favor. If the courts below erred, as we contend they did, the prejudice to defendants is manifest and the judgment must be reversed.

Respondent argues that this "additional evidence" was sufficient "to allow the jury and lower courts here 'to relate' to Denver the nation-wide conspiracy found in the *Paramount* case" (Br. p. 24). Respondent's argument, using the terminology of its footnote 16, is that the "mediate fact" in this case was petitioner's conduct in Denver. Respondent says that that fact was proved by so-called "independent evidence". Respondent then argues that the ultimate fact in this case was the innocent or improper quality of petitioner's conduct in Denver; that the *Paramount* case had determined the improper quality of the same pattern of conduct; and that, therefore, the decree was *prima facie* evidence of the ultimate fact in this case of a local conspiracy in Denver. Respondent bases that argu-

ment upon a paraphrase of this Court's summary of the trial court's charge with respect to the *Paramount* decree in the *Theatre Enterprises* case, *supra*, p. 543. We submit that this Court's summary of that charge is not susceptible of the interpretation given to it by respondent. The charge given by the trial court is directly contrary to respondent's position. The trial court's charge clearly instructed the jury that since the factual situation with respect to Baltimore theatres had not been before the court in the *Paramount* case, it was still necessary for plaintiff to prove that the defendants had "conspired in an unreasonable manner to keep first run exhibitions from the plaintiff", *supra*, p. 543.

Respondent here claims, however, that proof of the existence of a local conspiracy in Denver independently of the *Paramount* case decree was not required, that once it showed practices similar to those involved in the *Paramount* case, the decree in that case alone was adequate to establish that petitioners had acted pursuant to a conspiracy in Denver to the damage of respondent (Br., footnote 16, pp. 24-25). That claim, as *Theatre Enterprises* and *Dipson* distinctly hold, is erroneous.

To repeat, the ultimate fact in this case was whether petitioners were parties to a local conspiracy in Denver. The paragraph of the opinion in *Theatre Enterprises* from which respondent takes the phrase about relating the Paramount conspiracy to Denver clearly holds that the *Paramount* decree did not adjudicate the ultimate fact of a conspiracy in any local situation. *Theatre Enterprises* holds that if a decree in a Government case does not adjudicate the ultimate fact of conspiracy in a local situation it may not be used as the basis for a finding of a conspiracy in that situation. In other words, evidence that

certain trade practices existed in Denver may not be equated into a conspiracy merely by introducing the *Paramount* decree. Respondent, as this Court held in *Theatre Enterprises,* must still prove that it was injured as the result of a conspiracy in Denver.

Whether the *Paramount* decree is admissible in a private action is governed solely by the provisions of Section 5 of the Clayton Act. Under the clear language of that statute and the decisions of this Court in construing it, the Paramount decree was inadmissible here.

CONCLUSION

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all the proceedings herein, to the end that the judgment of the said Court of Appeals may be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

LOEW'S INCORPORATED,
TWENTIETH CENTURY-FOX FILM CORPORATION,
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